

GRM

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

CRIMINAL WRIT PETITION NO. 2707 OF 2022

Brijesh Shukla ... Petitioner
V/s.
The State of Maharashtra & Ors. ... Respondents

Mr. Brijesh Shukla, the Petitioner present in person.

Mr. A. R. Patil, APP for the State/Respondent No. 1.

Ms. Rimpal Trivedi, Adv. for Respondent no. 2.

CORAM : R. G. AVACHAT, J.

DATED : JANUARY 3, 2023

P.C. :

1. The challenge in this writ petition, under Article 227 of the Constitution of India, is to the orders granting interim maintenance and the residence in favour of the respondents herein.

2. Heard.

3. The petitioner is a practicing advocate. His appearance suggest that he is of good standing and repute as well. Be that as it may. The petitioner has married respondent no. 1 way back in June 1998. The couple is blessed with three children, one daughter and two sons. Both the petitioner and the respondent-wife started residing separately from each other since July 2017. The respondent-wife preferred an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for

short “PWDVA”) for various reliefs. In spite of service of notice of the said application, the petitioner did not mark his appearance in the matter. The respondent-wife had also moved an application for interim compensation.

4. The learned Metropolitan Magistrate, 34th Court, I/c. 72nd Court, Vikhroli, Mumbai vide his order dated 08/03/2019 allowed the application for interim maintenance and residence order as well. The order reads thus :-

“ORDER

1. Application is partly allowed.

2. The respondent no. 1 do pay Rs. 40,000/- per month to the applicant and three children (Rs. 10,000/- per month to each) as interim maintenance from the date of filing of the application.

3. Respondents are hereby restrained from committing any kind of physical, verbal or emotional abuse on applicant.

4. The respondent no. 1 is directed to secure an alternative accommodation on rent for the applicant and her three children either in Virar or in Ghatkopar within a period of one month from the date of knowledge of this order. Failure to do so, the applicant is at liberty to secure an alternative accommodation of one room kitchen of her choice and the respondent no. 1 shall pay the rent thereof on submission of rent receipts by the applicant.

5. Copy of order be sent to the respondent no. 1 by

RPAD.

6. Copy of order be sent to PI Tilak Nagar Police Station to assist the applicant for implementation of this order.

7. Copy of order be given free of cost to the applicant.”

5. The petitioner would submit that the aforesaid order was passed by the In-charge Court. The regular Court was on leave on the given date. The matter was hurriedly taken up before the In-charge Court by 4.30 p.m. The Court concerned passed an order merely relying on the averments in the application. The respondent-wife did not place on record any evidence in support of her contentions as regards the petitioner's financial status. The petitioner would further submit that in those days, his monthly income was very meager. Even both the petitioner and respondent-wife left the residence of petitioner's father and started residing in a premises taken on rent. The amount of maintenance of Rs. 10,000/- per month to each of the applicants, was very excessive and grossly inconsistent with the income of petitioner. The petitioner, therefore, preferred an application under Section 25(2) of PWDVA for modification of the order dated 08/03/2019. Along with the said application, he placed on record his Income-tax Returns for the relevant years. According to the petitioner, in the judgment of this Court in the case of **Smt. Anita w/o. Anand Tambe Vs. State of Maharashtra & Anr.** reported in **2007 ALL MR (Cri.) 1807**, it has been observed that the Income-tax Returns are the best evidence in proof of income. The quantum of maintenance should be 1/3rd of total income. The petitioner

would further submit that the learned Magistrate was pleased to reject his application for modification vide order dated 02/02/2021. According to him, it was in fact a case of change in the circumstances calling for modification of the order dated 08/03/2019. The Income-tax Returns of petitioner were not before the Court while the order granting interim maintenance was passed. The petitioner would further submit that he again moved an application Exhibit-25 for the similar relief under Section 25(2) of PWDVA. The said application was moved mainly on the ground that the Hon'ble Apex Court in the case of **Rajnish Vs. Neha and Another** reported in **(2021)2 Supreme Court Cases 324** has given guidelines as regards grant of maintenance. The petitioner, therefore, requested the Court concerned to comply with the directions in the case of **Rajnish Vs. Neha and Another** (*supra*) and pass the order on his application Exhibit-25. The learned Magistrate vide his order dated 24/12/2021 rejected the said application with cost of Rs. 10,000/-. According to the petitioner, the learned Magistrate ought to have followed the directions of Hon'ble Apex Court in the case of **Rajnish Vs. Neha and Another** (*supra*).

6. The petitioner took this Court to the averments in his petition, affidavit-in reply and sur-rejoinder. He would further submit that he purchased a Bolero Car in 2022. The Court is concerned with the financial status of petitioner in the year 2017, when the orders granting interim maintenance and residence were passed. The petitioner also availed a loan from the bank for

purchase of a vehicle. The petitioner would further submit that he was ready and willing to maintain his wife and children. He is also ready to pay some amount towards their maintenance, but the amount awarded under the order impugned herein, is exorbitant and beyond his means to pay. The learned Advocate ultimately urged for allowing the petition with direction to the learned Magistrate to decide his application for modification of the order dated 08/03/2019 on its own merits, after affording him a reasonable opportunity of hearing.

7. The learned Advocate for respondent-wife also took this Court through her affidavit-in-reply to ultimately urge for dismissal of the petition.

8. Considered the submissions advanced. Perused the order impugned herein.

9. The petitioner married the respondent-wife way back in June 1998. The couple is blessed with three children. The children are taking education. The respondents have been staying in Mumbai. One can take judicial note of cost of living in Mumbai. The record indicates that the petitioner had been keeping watch on the proceedings. For over 16 months, he did not appear before the Court of learned Metropolitan Magistrate, which was seized of the matter. According to him, on the day on which the order granting interim maintenance was passed, the regular Court was on leave. He therefore did not attend the Court.

10. It is true that the Court was on leave on the given date. The matter was taken up before the In-charge Court. The petitioner also pointed out a provision under Section 25 of PWDVA for duration and alteration, modification or revocation of the order passed in the application. As per Section 12(5) of PWDVA, the said application was expected to be decided within 60 days. The petitioner also submitted that he could not be blamed for delay in passing the order on the application of respondent-wife. It is also true that the order granting interim maintenance came to be passed only on the basis of the averments made in the application. The petitioner must blame himself. Being a practicing advocate of reasonable standing and good repute as well, he did not mark his appearance in the proceedings. He was keeping watch on the progress of matter. Section 29 of PWDVA provides for remedy of Appeal, which reads thus :-

“29. Appeal. - There shall lie an appeal to the Court of Session within thirty days from the date of which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.”

11. The phraseology of aforesaid provision would undoubtedly indicate that an order granting or refusing to grant interim maintenance is appealable one. The petitioner did not avail the remedy of appeal. He filed the writ petition. True, the petitioner may be justified in making an application under Section 25(2) of PWDVA for modification of the order dated 08/03/2019. For ready reference, Section 25(2) of PWDVA reads thus :-

“If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate.”

12. True, the Income-tax Returns of petitioner for the relevant period may somewhat favour his case. The fact is however that those Income-tax Returns were very much available with him while the order granting interim maintenance was passed. Had he marked his appearance in the proceedings and responded it for the application for grant of interim maintenance, his claim could have been considered. Placing reliance on the Income-tax Returns of the period during which the order dated 08/03/2019 came to be passed, could therefore not be considered to be a cause of action for the petitioner to move an application for modification of the order dated 08/03/2019. The petitioner did not challenge the said order dated 24/12/2021, whereby his first application for modification of the interim maintenance came to be rejected.

13. The petitioner again moved an application Exhibit-25. This time his claim was based on the guidelines in the case of **Rajnesh Vs. Neha and Another** (*supra*). The petitioner took this Court to the directions given by the Hon’ble Apex Court.

14. Admittedly, the order granting interim maintenance and the petitioner’s application for modification of the said order, precede Hon’ble Apex Court’s judgment in the case of **Rajnesh Vs. Neha and Another** (*supra*). The petitioner ought to have preferred an

appeal under Section 29 of PWDVA, for taking exception to the order rejecting his second application for modification of the order. He did not avail the remedy of appeal. It was expected from him, being an advocate, to avail an equally efficacious remedy of appeal. This Court do not propose to direct him to avail that remedy since 5 years have passed post the respondent-wife filed an application under Section 25 of PWDVA. The parties are still at the stage of grant of interim maintenance. It would therefore not be desirable to remit the matter to the Appellate Court or even back to the learned Magistrate Court for deciding the matter afresh after giving the petitioner an opportunity of hearing.

15. In view of this Court, the quantum of maintenance awarded may not be exorbitant. Admittedly, the petitioner purchased a car worth little over Rs. 15 lakhs. The petitioner had even not paid a farthing in compliance with the order of interim maintenance. It is only when a distress warrant came to be issued, he deposited not more than a sum of Rs. 1 lakh and secured an interim relief. The relief appears to have been granted only to ensure that the petitioner is not arrested. The petitioner appears to have taken advantage thereof and even urged for continuation of the said order since he proposes to approach the Hon'ble Supreme Court. The petitioner impliedly admitted during his submissions that with passage of time his practice has grown. In view of this Court, the writ petition deserves to be dismissed with certain directions to the learned Magistrate.

16. In view of the above, the petition stands disposed of in terms

of the following order :-

ORDER

- a. Writ Petition stands dismissed.
- b. The petitioner is directed to deposit with the Trial Court all the arrears of interim maintenance. The Trial Court shall decide the main application on its own merits within a time-frame of 6 months from the date of receipt of the copy of this order. The Trial Court shall give the parties full opportunity of hearing. It shall ensure compliance of the directions of Hon'ble Apex Court in the case of **Rajnish Vs. Neha and Another** (*supra*). Needless to mention that based on the evidence in the matter, the quantum of maintenance may vary on either lower or higher side of the quantum of interim maintenance. If the Trial Court finds the respondents to be entitled to quantum of maintenance lesser than the one granted as an interim maintenance, the amount directed to be deposited by the petitioner towards arrears of interim maintenance, would be given due set off.
- c. Writ petition stands disposed of accordingly.

(R. G. AVACHAT, J.)