



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH AT NAGPUR.**

Criminal Writ Petition No. 594 of 2023

(1) Sahil Sanjay Rathod
Aged about 33 years,
Occupation : None

(2) Anutai Bhopidas Rathod,
Aged about 89 years

(3) Sanjay Bhopidas Rathod,
Aged about 64 years

(4) Suchita Sanjay Rathod
Aged about 54 years

All Residents of Veer Wamanrao
Square, Tilakwadi, Yavatmal,
Taluka and District : Yavatmal.

... Petitioners

- Versus -

Swati Sahil Rathod,
aged about 32 years,
Occupation : Household,
C/o Vilas Jadhao, Shubham
Colony, Plot No. 27,
Lohara – Waghapur Bypass
Road, Yavatmal,
Taluka and District : Yavatmal

... Respondent

Mr. R. R. Deo, Advocate h/f Mr. A. S. Manohar, Advocate for petitioners
Mr. A. K. Bhangde, Advocate for respondent

CORAM : ANIL L. PANSARE, J.

Date of reserving judgment : 16-10-2023

Date of pronouncing judgment : 18-10-2023

JUDGMENT

Rule. Rule made returnable forthwith. With consent, the petition is heard finally.

2. The challenge is to the order dated 7-8-2023 passed by learned Additional Sessions Judge, Yavatmal in Criminal Appeal No. 9/2023 as also the order dated 10-3-2023 passed by learned 7th Judicial Magistrate First Class, Yavatmal in Misc. Criminal Application No. 79/2022.

3. The respondent/original complainant has filed application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short 'D.V. Act') against the petitioners, who are her husband and in-laws. The respondent, pending the aforesaid application, has filed application under Section 23 of the D.V. Act seeking interim maintenance as also the interim order of residence to the extent of two rooms, toilet and bathroom of the house where the petitioners are residing. Learned Judicial Magistrate First Class, Yavatmal vide order dated 10-3-2023 has allowed the application partly. He directed the husband to pay interim maintenance at the rate of Rs. 3,000/- per month. However, prayer of residence has been allowed as requested for. This order passed by the learned Magistrate was

assailed under Section 29 of the D.V. Act before the Sessions Court. The Sessions Court vide order dated 7-8-2023 dismissed the appeal. The aforesaid orders have been challenged by way of present petition.

4. Learned counsel for the petitioners submits that the petitioners have no grievance so far as order of maintenance is concerned. The grievance is about the order of residence passed by the learned Magistrate which was upheld by the learned Sessions Court.

5. Learned counsel for the petitioners has invited my attention to Section 19 of the D.V. Act which provides that while disposing of an application under Section 12 of the D.V. Act, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order in terms of Section 19 of the D.V. Act. The emphasis is on the expression “being satisfied that domestic violence has taken place”. Learned counsel for the petitioners submits that this provision provides for passing final order regarding residence in terms of Section 19 of the D.V. Act.

6. The order under question is an interim order and is passed in terms of Section 23 of the D.V. Act. He submits that it is well settled that while passing interim order, the Magistrate will have to record *prima facie* satisfaction of occurrence of domestic violence at the hands

of the petitioners. According to learned counsel, though this finding has been recorded, the learned Sessions Court has not considered the messages exchanged between the respondent – wife and petitioner no. 1 – husband. The screenshots of the mobile showing these messages were placed before the Sessions Court. These messages are such, that would indicate that the petitioners have not committed any domestic violence as alleged by the respondent.

7. I have gone through the record, including the messages. The marriage between respondent and petitioner no. 1 – husband was solemnized on 24-5-2021. The first message is dated 22-8-2021 and the last message is dated 23-10-2022. The complaint under Section 12 of the D.V. Act is filed on 30-6-2022. Thus some messages were sent even after filing complaint. Having gone through the messages, it appears that the respondent has repeatedly expressed her love and affection to petitioner no. 1 and has apologized to him as well. The message also indicates that someone is making an attempt to take advantage of the quarrel that occurred between the two and that the respondent is not inclined to allow third party to take advantage of the situation. The message does not indicate any allegation of domestic violence rather it indicates that the respondent is badly missing the petitioner no. 1.

8. Learned counsel for the respondent submits that these messages are not admissible. Petitioner no. 1 has in written statement pleaded that he has blocked the respondent's mobile number. There is possibility of planting these messages to which learned counsel for the petitioners submits that the certificate under Section 65B of the Indian Evidence Act has been placed on record.

9. I do not find any substance in the submissions made by the learned counsel for the petitioners. If these messages were inadmissible in evidence, the Sessions Court was at liberty to discard the evidence by recording *prima facie* view that these messages cannot be taken aid of by assigning the reasons.

10. The grievance of the petitioners is that the learned Sessions Court has not considered the documents placed on record which indicate screenshots of the messages. As stated earlier, the perusal of messages indicates that the respondent has repeatedly expressed her love and affection towards petitioner no. 1. She has apologized for her acts. The messages do not indicate domestic violence at the hands of any petitioner. These messages are indeed important to arrive at a *prima facie* conclusion as to whether the domestic violence has taken place as alleged by the respondent.

11. The Sessions Court has noted that the respondent has approached the trial Court because the petitioners have subjected her to domestic violence. It further noted that the incidents had constrained her to approach the police station and lodge report against the petitioners. The Court proceeds to record that unless there being unbearable violence, no prudent woman would step into the police station and lodge report against her husband and in-laws. The Court then records that there is sufficient material to hold that *prima facie* there is reason to believe that the petitioners have caused domestic violence to the respondent and, therefore, as a matter of last resort, the irked wife has knocked the doors of the Court.

12. It appears that the Sessions Court has accepted the allegations made by the wife to be gospel truth for the reason that no prudent woman would step into police station and lodge report against her husband and in-laws. These findings suffers from surmises and conjectures. The Sessions Court ought to have considered all the documents placed before it which includes the vital documents like exchange of messages between the husband and wife before arriving at a *prima facie* conclusion of occurrence of domestic violence against the respondent.

13. Learned counsel for the respondent has placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of ***Prabha Tyagi Vs. Kamlesh Devi [(2022) 8 SCC 90]***. The Hon'ble Supreme Court considered the three points in the peculiar facts and circumstances of the case where the husband had expired in the fatal accident leaving behind the pregnant wife and where the relatives of the husband on several occasions threatened the wife that she would face dire consequences, if she ever attempts to claim any right over her husband's property. The relatives have allegedly tortured her mentally by denying that her child was the daughter of deceased husband. The three points and its answers are recorded in paragraph no. 75 which read thus :-

75.1 *“(i) Whether the consideration of Domestic Incidence Report is mandatory before initiating the proceedings under the Domestic Violence Act, 2005 in order to invoke substantive provisions of Sections 18 to 20 and 22 of the said Act?”*

It is held that Section 12 does not make it mandatory for a Magistrate to consider a Domestic Incident Report filed by a Protection Officer or service provider before passing any order under the D.V. Act. It is clarified that even in the absence of a Domestic Incident Report, a Magistrate is empowered to pass both ex parte or interim as well as a final order under the provisions of the D.V. Act.

75.2 *“(ii) Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been levied at the point of commission of violence?”*

It is held that it is not mandatory for the aggrieved person, when she is related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, to actually reside with those persons against whom the allegations have been levelled at the time of commission of domestic violence. If a woman has the right to reside in the shared household under Section 17 of the D.V Act and such a woman becomes an aggrieved person or victim of domestic violence, she can seek reliefs under the provisions of D.V Act including enforcement of her right to live in a shared household.

75.3 *“(iii) Whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed?”*

It is held that there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed vis-à-vis allegation of domestic violence. However, it is not necessary that at the time of filing of an application by an aggrieved person, the domestic relationship should be subsisting. In other words, even if an aggrieved person is not in a domestic relationship with the respondent in a shared household at the time of filing of an application under Section 12 of the D.V Act but has at any point of time lived so or had the right to live and has been subjected to domestic violence or is later subjected to domestic violence on account of the domestic relationship, is entitled to file an application under Section 12 of the D.V Act.

14. Learned counsel for the respondent submits that the Supreme Court has held that the wife has right to reside in the shared household under Section 17 of the D.V. Act and, therefore, no interference is called for in the impugned judgment.

15. There cannot be any dispute on the aforesaid proposition of law that the wife has right to reside in a shared household. That right, however, is not absolute. The said right is subject to other provisions, viz. the existence of domestic relationship, occurrence of domestic violence etc. This right cannot be exercised in absence of the proof of domestic violence. The satisfaction of the Magistrate that the domestic violence has taken place is *sine qua non* before passing the residence order under Section 19 of the D.V. Act. The wife will have to satisfy, firstly that she was in domestic relationship and that she suffered domestic violence at the hands of husband/in-laws or relatives, as the case may be, before seeking any relief under the provisions of the D.V. Act. The judgment, therefore, will be of no assistance to the respondent.

16. The Sessions Court was duty bound to consider the material placed before it, including screenshots of messages, before arriving at a prima facie view of occurrence of domestic violence. Having not done so, the impugned judgment passed by the Sessions Court is unsustainable in law. The appeal will have to be restored back on the file of the Sessions Court for consideration afresh in the light of whatever has been said in the body of the order. Hence, following order.

ORDER

- (i) The petition is partly allowed.
- (ii) The judgment and order dated 7-8-2023 passed by the Additional Sessions Judge, Yavatmal in Criminal Appeal No. 9/2023 is quashed and set aside.
- (iii) Criminal Appeal No. 9/2023 is restored on the file of Sessions Court, Yavatmal for disposal afresh in accordance with law and after giving an opportunity to both sides as also by considering the material placed before it.
- (iv) The parties shall appear before the Sessions Court, Yavatmal on 1-11-2023.

(Anil L. Pansare, J.)

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