



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

CRIMINAL WRIT PETITION NO. 704 OF 2023

Shri Narayan Vishwanath Kambale

.Vs.

Ashwini W/o. Narayan Kambale and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions Court's or Judge's orders.
and Registrar's Orders.

Mr Ibrahim Fidvi, Advocate for the petitioner
Mr A. S. Dhore, Advocate for respondent No.1

CORAM : G.A. SANAP J.

DATE : AUGUST 06, 2024

Heard finally at admission stage.

2. In this writ petition, the challenge is to the judgment and order dated 14.09.2022 passed by the learned Additional Sessions Judge, Mehkar, whereby the learned Judge, with partial modification of the impugned order, dismissed the appeal filed by the petitioner under Section 29 of the Protection of Women from Domestic Violence Act, 2005 (for short 'the D. V. Act').

3. Respondent No.1 is the wife of the petitioner. Respondent No.1 is the only contesting party. The rest of the respondents have been joined as a formal party being party to the D. V. Act proceeding. Respondent No.1 has filed a proceeding under the D. V. Act against the

petitioner and other respondents. Petitioner and respondent No.1 got married on 03.04.2016. They are blessed with a female child. The female child, on the date of filing of the proceeding, was four years old. The child was in the custody of the petitioner. It is the case of respondent No.1 that the petitioner suspected her character and started ill-treating her. He was not ready to cohabit with respondent No.1. The petitioner demanded Rs.1,00,000/- from her parents. The parents could not meet this demand. Therefore, she was subjected to mental and physical cruelty. Respondent No.1 lodged the report with the police. On her report, the prosecution has been lodged against the petitioner and others. The petitioner, according to respondent No.1, drove her out of the matrimonial house. She has been residing with her parents at Lonar. She has no source of income. The custody of the daughter was illegally retained by the petitioner. Respondent No.1 in D. V. Act proceeding made an application for interim maintenance as well as for the custody of the daughter.

4. The petitioner filed the reply to the application and opposed the same. He has admitted that, on the report of respondent No.1, the crime has been registered against him. It the case of the petitioner that the

respondent No.1, on her own, left the matrimonial house. She has abandoned his company without any reasonable cause. The custody of the daughter was with him because respondent No.1 left his house without taking daughter with her. It is stated that he has no source of income. Respondent No. 1, according to him, is working in the hospital at Lonar. She has done diploma course of ANM. She is working as a 'Nurse' in the hospital and earning Rs.8000/- to Rs.10,000/- p.m.

5. Learned Magistrate, on consideration of the material placed on record, partly allowed the application and directed the petitioner to pay the interim maintenance of Rs.3,000/- each to respondent No.1 and the daughter. Learned Magistrate, as per the said order, directed the petitioner to handover the custody of the daughter to respondent No.1, till the decision of the application made by respondent No.1. The petitioner challenged this order passed by the Magistrate by way of an appeal. Learned Additional Sessions Judge partly allowed the appeal and reduced the quantum of maintenance from Rs.3,000/- to Rs.2,250/- each for respondent No.1 and her daughter and specifically stated the dates for payment of the maintenance. The applicant has questioned the correctness of this order in this

petition.

6. I have heard the learned Advocates for the parties. Perused the record and proceedings.

7. Learned Advocate for the petitioner submitted that the order has been passed directing the petitioner to pay the maintenance without any evidence with regard to his income etc. Learned Advocate further submitted that considering the age of the daughter, custody was handed over to the mother, but no direction was issued as to the visitation right of the petitioner. Learned Advocate for the petitioner fairly conceded that the petitioner has not complied the order of maintenance. It is stated that he is not financially well-off to comply the order. Learned Advocate submitted that the Courts below have failed to take take into consideration the income of respondent No.1.

8. Learned Advocate for respondent No.1 submitted that the learned Magistrate has recorded a finding on *prima facie* analysis of the materials that respondent No.1 was subjected to domestic violence by the petitioner. Learned Advocate submitted that respondent No.1 has no source of income and she has

been residing at the mercy of her parents. Learned Advocate submitted that the petitioner has not made any provision for the maintenance of respondent No.1 and his daughter despite the order passed by the learned Magistrate. Learned Advocate pointed out that the application made by the petitioner for custody of the daughter under Section 7 of the Guardian and Wards Act, 1890 has been rejected by the District Court at Buldhana. It is pointed out that in the said proceeding also he did not pray for visitation right. Learned Advocate further submitted that he is entitled to a visitation right. It will be open for him to make an appropriate application before the Magistrate and on such an application, the learned Magistrate could pass an appropriate order keeping in mind the material placed on record before the Magistrate. Learned Advocate submitted that while quantifying the interim maintenance, the learned Magistrate has taken into consideration the job done by the petitioner.

9. I have gone through the record and proceedings and minutely perused the order passed by the learned Magistrate as well as the order passed by the learned Additional Sessions Judge. As far as the issue of custody is concerned, it has been settled by the judgment and order passed by the District Judge in a custody

proceeding adopted under the Guardian and Wards Act, 1890. The District Judge has rejected the prayer of the petitioner for custody of the child. Perusal of the order passed by the District Judge would show that the learned District Judge has observed that the welfare of child is the paramount consideration. While deciding the custody, learned District Judge, on the basis of the available material, recorded a finding that, considering the age of the daughter, the mother would be the appropriate person to retain custody of the daughter. It needs to be stated that as on date the daughter is barely 7 years old. In case of a small child, the mother is the proper person to take care in all respects. In this case, respondent No.1 is not doing any work or job. The petitioner has not placed on record any cogent evidence to accept his contention that she is working as a nurse in the hospital at Lonar. Learned Magistrate, while deciding the interim application for custody, has taken all these facts into consideration. On going through the record and proceedings, I am of the view that this part of the order directing the handing over of the custody of the child to the mother cannot be interfered with.

10. Learned Magistrate, on the basis of the available evidence, has recorded his *prima facie* opinion on the

issue of domestic violence. Learned Magistrate has observed that respondent No.1 was subjected to domestic violence by the petitioner. Learned Magistrate has taken into consideration the available material, including the record of criminal case registered against the petitioner on the basis of her report. Learned Additional Sessions Judge, in the exercise of his appellate jurisdiction, has re-appreciated the said material and agreed with the conclusion arrived at by the learned Magistrate as to the domestic violence caused to respondent No.1. On going through the record, I am satisfied that these findings do not warrant interference. The findings are based on the material on record. The available material on record has been properly considered.

11. As far as the quantum of interim maintenance is concerned, in my view, the learned Additional Sessions Judge has rightly reduced the quantum from Rs.3000/- to Rs.2,250/- each for respondent No.1 and her daughter. Learned Additional Sessions Judge has taken into consideration the source of income of the petitioner and the nature of his job. Learned Judge has observed that the petitioner is under an obligation to maintain his wife and daughter. The petitioner, as can be seen from the observations of the Courts below, is able-bodied. He is

working as a labor. It is his case that he is not earning Rs.500/- per day. In my view, this contention of the petitioner cannot be accepted. A daily wager in the village and even at a taluka place is paid Rs.500/- per day, even for doing work on the agricultural land. In the facts and circumstances, I am of the view that the Courts below have properly considered the material on record. Learned Additional Sessions, considering the contention of the applicant, was pleased to reduce the quantum as stated above. In view of this, I do not see any substance in this petition. The petition, therefore, deserves to be dismissed. It is accordingly **dismissed**.

12. As far as the visitation right is concerned, the petitioner would be at liberty to make an appropriate application before the learned Magistrate.

13. The criminal writ petition stands disposed of accordingly. Pending applications, if any, stand disposed of.

(G. A. SANAP, J)