

(2020) 05 BOM CK 0022

In the Bombay High Court

Case No : Criminal Writ Petition No. 1700 Of 2019

Sudarshan s/o Subhash Swami

APPELLANT

Vs

Jyoti w/o Sudarshan Swami And Others

RESPONDENT

Date of Decision : 08-05-2020

Acts Referred:

Hindu Marriage Act, 1955 — Section 9

Code Of Criminal Procedure, 1973 — Section 125(4)

Protection Of Women From Domestic Violence Act, 2005 — Section 3(a)(d)(iv), 12

Constitution Of India, 1950 — Article 226, 227

Citation : (2020) 05 BOM CK 0022

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : H. I. Pathan, Y. K. Delmade

Final Decision : Dismissed

Judgement

1. Present petition has been filed by the original respondent husband challenging the order of rejection of his appeal i.e. Criminal Appeal No. 36 of 2017 by learned Additional Sessions Judge, Basmathnagar on 03-07-2019 wherein he had challenged the interim maintenance order passed by learned Judicial Magistrate First Class, Basmathnagar on 20-11-2017 in Criminal Application (Protection of Women From Domestic Violence Act) No.53 of 2016 at Exhibit 04. By this order the learned Judicial Magistrate First Class had directed the respondent husband to pay interim maintenance @ Rs.1500/- per month.

2. Heard learned Advocate Mr. H. I. Pathan for petitioner and learned Advocate Mr. Y. K. Delmade for respondent No.1.

3. It has been vehemently submitted on behalf of the petitioner husband that, the learned trial Judge failed to consider that, there was nothing on record which would positively show that the wife has been subjected to domestic violence. A cryptic order has been passed only on the basis of contents of the application and by ignoring the say filed by the respondent. There was nothing to show that,

the husband had deserted the wife. Further the husband had filed petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act before Family Court at Nanded vide Petition No. A 91 of 2016, it has been decided on 02-02-2018, thereby decreeing the petition and directing the wife to resume cohabitation. Under such circumstance, the wife is not entitled to get maintenance much less interim maintenance. He, therefore, prayed for setting aside the impugned order.

4. He relied on the decision in, *Vanmala Versus H.M.Ranganatha Bhatta*, reported in 1995 (2) Mh.L.J. 740, wherein it has been observed that, if the wife is refusing to live with the husband without any reasonable cause then she is not entitled to get maintenance. The same yardstick which is adopted under section 125 (4) of Code of Criminal Procedure is also required to be adopted under Domestic Violence Act also. He further relied on the decision of this Court in *Sanjivani Ramchandra Kondalkar Versus Ramchandra Bhimrao Kondalkar and Anr.*, Criminal Writ Petition No. 2547 of 2016, decided on 18-12-2019, wherein also by relying upon *Vanmala's Case (Supra)* it was observed that, when it was found that the husband was ready to maintain wife but wife has refused, wife is not entitled to get maintenance.

5. Per contra, the learned advocate appearing on behalf of wife submitted that, well reasoned order has been passed by the learned Appellate Court while dismissing the appeal and, therefore, no interference is required at the hands of this Court. In fact, the domestic violence need not be only physical but also economic abuse is covered under the definition thereof. The husband has not at all shown as to what arrangements he has made. In fact now the matter has proceeded and the evidence of the wife has been recorded. The cross-examination of the wife would show that, even after the order passed by the learned Family Court asking her to resume cohabitation, she says that she had gone along with her father and maternal uncle. but then she says that she was refused by the present petitioner. Petitioner cannot encash his own misdeeds.

6. At the outset, the chronology of the events is required to be considered. The relationship between the parties is not denied. The original applicant/ aggrieved person is the wife of original non-applicant No.1. She has filed application for getting various reliefs under Section 12 of the Domestic Violence Act. During the pendency of the said proceeding she has filed application at Exhibit 04 claiming interim maintenance. At that stage except the pleadings, there could not have been anything. On the basis of the allegations and hearing both sides, the learned Trial Judge had come to the conclusion that since the husband is physically fit and he has the responsibility to maintain the wife, yet he has not made any provision, the interim maintenance was directed to be paid @ of Rs.1500/- per month. That order was challenged by the husband in Criminal Appeal No.36 of 2017. That appeal was filed on 27-12-2017 and it came to be decided i.e. dismissed on 03-07-2019. It appears that, before the learned Appellate Court the advocate who was representing the husband had filed written

notes of arguments. Though the petition for restitution of conjugal rights came to be decreed on 02-02-2018 and at that time the appeal filed by the present petitioner was still pending before the Appellate Court ; the appellant therein had not made any efforts to file the copy of the Judgment and decree in Petition No. A 91 of 2016 by learned Judge of the Family Court, Nanded. Under such circumstance, on the basis of whatever material was before the learned Appellate Judge, the appeal has been decided. But now at this stage it appears that, the husband wants to encash the decree that has been passed by the learned Judge of the Family Court. That document cannot be considered for the first time in writ petition when the said opportunity was already available to the petitioner when his matter was before the Appellate Court. Further though the decree is running against the wife, yet in her cross-examination which was recorded on 28-03-2019 before the learned Judicial Magistrate First Class, she has admitted that such decree was passed against her. She denied the suggestion that even after the said decree, she did not resume cohabitation. It is then extracted from her as to when she had gone, she has replied that, within eight to fifteen days of the decree she went for cohabitation. She was left there by her father and maternal uncle but she was not allowed by the husband to come inside the house. No doubt she has stated that, she had not made any complaint about the same to police regarding the said incident, yet the fact remains that something has been extracted in her cross-examination and it has to be then appreciated.

7. When interim order was passed; it is required to be seen what was before the learned Trial Judge and any subsequent event or any subsequent decision of a competent Court may not affect it. Not only as regards the physical abuse or violence the wife has stated but it is then also required to be considered as to whether there was economic abuse as defined in Section 3 (a) (d) (iv) of Protection of Women From Domestic Violence Act. Therefore, there is no illegality or error committed by the learned Trial judge in passing the order of interim maintenance. The husband has every opportunity to contest the matter by leading evidence as per his choice so also the wife is having such liberty. Therefore, only on the basis of order passed at interim stage, the husband need not challenge it on the basis of some material which has taken place after the order was issued by the learned Trial Judge. There is no such circumstance shown by the petitioner to invoke the constitutional powers of this Court either under Article 226 or under Article 227 of the Constitution of India. There is no merit in the present writ petition, it deserves to be rejected, accordingly it is rejected.