

**HIGH COURT OF JAMMU AND KASHMIR**  
**AT SRINAGAR**

CRM (M) no. 72/2020  
CrIM no. 162/2020 c/w  
CRMC no. 13/2019  
CrIM no. 178/2019

Reserved on 11.05.2021  
Pronounced on 17.06.2021

(Virtual mode)

- i) Ehsan Ali dar
- ii) Nissar Hussain Dar and others

.... Petitioner(s)

Through: Mr Salih Pirzada, Advocate

V/s

- i) Nighat Banu and another
- ii) Nighat Banu and another

... Respondent(s)

Through: Mr Shafaqat Nazir, Advocate

**CORAM:**

**Hon'ble Mr Justice Ali Mohammad Magrey, Judge**

**JUDGMENT**

By this judgment I propose to dispose of two petitions together as both pertain to one and the same controversy.

**CRM (M) no. 72/2020**

By the instant petition, the petitioner challenges the *ex-parte* judgment and order dated 29<sup>th</sup> February, 2020, for short impugned order, passed by the court of Judicial Magistrate 1<sup>st</sup> Class (3<sup>rd</sup> Additional Munsiff), Srinagar, for short trial court, on the petition titled Nighat Bano and another v. Ehsan Ali Dar, filed by the respondent under and in terms of Section 488 of the Code of Criminal Procedure, whereby the trial court while allowing the petition has granted Rs. 60,000/- as monthly maintenance charges in favour of the respondents holding them entitled to receive the maintenance @ Rs. 30,000/- each, from the date of institution of the petition i.e. 03.07.2019.

The challenge to the impugned order is made *inter alia* on the grounds that the trial court under the influence of the interim order of this Court passed in a petition bearing CRM (M) no. 268/2019, reducing the interim maintenance of Rs. 50,000/- to Rs. 30,000/-, by misconstruing the same as confirmation of the interim maintenance, has passed the impugned order; the interim order of this court by CRM (M) no. 72/2020 along with CRMC no. 13/2019

virtue of which the interim maintenance was reduced to Rs. 30,000/- was purely an interim arrangement made at its threshold and the petition on the subject is not finally decided, therefore, the impugned order has dissected the cause of maintenance into interim and final where final determination is given precedence over the interim relief; the trial court, by passing the impugned order, has disregarded and sterilized the supervisory powers of this Court; the impugned order impinges upon the rights of the petitioner in the proceedings pending before this court as the issue vis-à-vis the quantum of interim maintenance is pending adjudication before this court; the impugned order has been passed in disregard to the earning capacity of the petitioner and the monthly maintenance of Rs. 60,000/- is based on no creditable evidence; the impugned order has caused miscarriage of justice, therefore, cannot be allowed to sustain.

To understand the controversy in proper perspective, a brief look at the events, leading to the filing of the instant petition is taken note of in the first instance, thus:

The petitioner is stated to be working as a General Site Technician at Odeh Asalem Automation Systems L.I.C, ODASCA, in Dubai, United Arab Emirates, who has married respondent no. 1 on 28<sup>th</sup> August, 2014, and out of their wedlock respondent no. 2 is begotten. The relations got strained and the respondent no. 1, allegedly feeling neglected, filed a petition seeking maintenance in terms of Section 488 of the Cr.P.C. The trial court, on consideration of the matter, awarded *ex-parte* interim maintenance of Rs. 50,000/- in favour of respondents in terms of order dated 30.07.2019 which was challenged by the petitioner before this Court in a petition bearing CRM (M) no. 268/2019 and this Court, while issuing notice to the other side, reduced the interim maintenance to Rs. 30,000/- in terms of order dated 20.11.2019. Subsequent thereto the trial court, in terms of impugned order, allowed the petition under section 488 of the Cr.P.C., and granted maintenance of Rs. 60,000/- in favour of respondents. The petition CRM (M) no. 268/2019, came to be disposed of on the statement of the learned counsel for the petitioner seeking liberty to challenge the final order in the appropriate proceedings, in terms of order dated 6<sup>th</sup> March, 2020.

**CRMC no. 13/2019**  
**CrIM no. 178/2019**

By this petition, the petitioners, who are parents and siblings of Ehsan Ali Dar, petitioner in the CRM (M) 72/2020, are challenging and seeking quashment of the complaint filed in terms of Section 12 of the Protection of Women from

Domestic Violence Act, 2010, for short Act, by the respondent no.1 and the proceedings initiated thereupon by the court of Judicial Magistrate 1<sup>st</sup> Class (Sub Registrar), Srinagar, *inter alia* on the ground that the cognizance taken by the learned Magistrate is bad in law as the same is done in absence of report required in terms of Section 12 of the Act; the complainant never lived in a shared house with petitioners, therefore, the complaint is baseless; the complaint is an abuse of process of law as the respondent is dragging the whole family of her husband into litigation; there is no genuine cause shown in the complaint so as to proceed against the petitioners in terms of the impugned complaint; the reliefs prayed for in the complaint do not pertain to petitioners in any way; the respondent is trying to take undue advantage of the process of law which amounts to abuse of process of law; there is no cause or allegation or incident of domestic violence alleged/ reported against the petitioners in the complaint; the petitioners are dragged into litigation by the respondent only on the ground that they are relatives of respondent no. 2; the prayer sought in the complaint would itself show that the petitioners have got nothing to do with the same as she is seeking an order for residence; maintenance; compensation and protection which are solely the concern of respondent no. 2; there is no incident of domestic violence mentioned anywhere in the complaint that would implicate the petitioners with the commission of any crime.

This court, on consideration of the matter, while issuing notice to the other side has stayed the proceedings in the complaint titled Nighat Bano v. Ehsan Ali and others insofar as it related to the petitioners herein.

While considering the petition no. 72/2020, this court in terms of order dated 24.11.2020, after having been apprised about pendency of another petition on the subject, directed for listing of the same with the petition in hand, therefore, the CRM (M) no. 72/2020 and CRMC No. 13/2019 were adjudicated upon simultaneously.

The learned counsel for the petitioner was heard on 23.12.2020 and the matter was kept for advancing arguments on behalf of respondents on 30.12.2020, however, the learned counsel for the respondents' was partly heard on 31.03.2021 as the matter got adjourned on the fixed date. Subsequently, in terms of order dated 15<sup>th</sup> April, 2021, the court, taking note of the persistent technical snag in the virtual mode of hearing, directed the parties to submit their written arguments within one week and posted the matter for consideration on 30<sup>th</sup> April, 2021. The parties, however, did not submit their written arguments on the scheduled date, therefore,

further week's time was granted for the purpose. Finally, the written arguments were submitted through virtual mode. The learned counsel for the petitioner has vehemently argued that the respondent no. 1, having been divorced in terms of the personal law, is not entitled to any maintenance as she ceased to be the wife of petitioner.

Considered the submissions made and went through the material made available.

The court, from the very inception, made an endeavour that the parties to the dispute enter into a compromise so that their differences are set at rest and they get a chance to live a peaceful life together. However, the efforts did not materialize. The only tangible issue, as it appears, from both the petitions is in respect of the monthly maintenance of respondent Nighat Banu and the minor child Zulfishan. The complaint filed under and in terms of the Domestic Violence Act, also appears to be a branch of the same tree.

The points raised by the petitioners in CRMC 13/2019 against the complaint filed under and in terms of the Domestic Violence Act and the process issued thereon, appear to be carrying weight as the other side has not been able to show anything concrete to negate such assertions of the petitioners. It would be profitable to reproduce the Section 12 of the Act herein, thus:

*"12. Application to Magistrate. (1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:*

*Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.*

*(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:*

*Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure,*

1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left for such set off.

(3) Every application under sub-section (1) shall be in such form and contained such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.”

The perusal of the complaint filed in terms of Domestic Violence Act by the respondent herein, before the court below, on the fact of it, does not make out a case of domestic violence against the petitioners in CRMC no. 13/2019 as the respondent has not indicated anywhere as to how the petitioners have committed domestic violence against her. No incident of whatever nature has been mentioned in the complaint that would *prima facie* lead one to the conclusion that the petitioners are actually involved in such offence. The complaint appears to be an act of vengeance aimed at to settle score with the respondent no. 2, Ehsan Ali Dar. The petitioners have been dragged to the litigation by the respondent no. 1 merely for being the relatives of respondent no. 2.

It being so, the petition, CRMC 13/2019, succeeds and is allowed as such. The complaint filed in terms of Domestic Violence Act before the Court below titled *Nighat Bano v. Ehsaan Ali and others* pending before learned Sub Registrar, JMIC, Srinagar under File No. 754/M, and the proceedings initiated thereupon against the petitioners herein are quashed. File shall be consigned to records.

**CRM (M) no. 72/2020**

**CrIM no. 162/2020**

The admitted position of the case is that the parties to the dispute have married and out of the wedlock a child namely Zulfishan is born and that the petitioner is working abroad. The petitioner's contention that the trial court fell in error by fixing the amount of maintenance as the same is fixed in disregard of the income of the petitioner which ought to have been taken into consideration. The monthly salary of the petitioner, as per the salary certificate appended on record, is Rs. 57,000/- and the petitioner, on such income, has to survive in Dubai and has to, in all probability, look after his aged parents and two unmarried siblings. The further contention of the learned counsel for the petitioner was that the trial court

has erroneously fixed the amount of maintenance as Rs. 60,000/- which is even higher than the amount he is earning.

The contentions raised by the learned counsel for the petitioner carry weight as the petitioner is shown to be earning Rs. 57,000/- per month and the amount of maintenance has to be fixed only in due regard to the earning capacity of the petitioner and not in vacuum. The contention gains more significance in absence of any document on record negating such assertion of income of the petitioner. The trial court was not right in fixing the amount of maintenance solely on the exparte oral evidence of the respondent. The trial court has further fallen in error in holding that this court, in terms of order dated 20.11.2019 passed in CRM (M) 268/2019, has confirmed the interim maintenance at Rs. 30,000/-, as the petition was pending consideration and the arrangement was purely interim in nature and certainly subject to final determination. Thus, while keeping in view the document available on record as regards the income of the petitioner, the amount of maintenance (Rs. 60,000), allowed by the trial court is certainly very extreme and harsh.

Having said that, this court is conscious of the fact that a lady has to sustain herself and has to maintain the minor child also and they cannot be allowed to live a life of vagrancy, therefore, while keeping in view all these factors and more importantly the inflation ratio in mind, the impugned order is modified by reducing the amount of maintenance to Rs. 25,000/- per month i.e. Rs. 10,000/- in favour of respondent no.1 and Rs. 15,000/- in favour of respondent no. 2. The amount of maintenance shall be payable from the date of filing of the application. An amount of Rs. 2.00 lacs already paid by the petitioner shall be adjusted from the amount due towards the amount of maintenance and if there are arrears, the same shall be cleared within a period of three months. The amount of maintenance awarded in favour of respondent no. 2, minor child, shall be paid to her through respondent no. 1 who shall utilize the same for her education and other necessary care. It is observed that this court has not deliberated over the issue of subsistence of marriage between the parties as the same is a matter of evidence and can be agitated before the appropriate forum where the continuance of maintenance in favour of respondent no. 1 would finally be decided, therefore, this order, inasmuch as it pertains to grant of maintenance in favour of respondent no.1, shall be valid till the decision is rendered by the appropriate forum regarding divorce of said respondent.

The petition in hand is disposed of on the above lines along with all connected CrIMs.

Registry shall keep a copy of this order on each file and forward one to the courts below for information and compliance. Registry to send down the records, if any obtained.

**(Ali Mohammad Magrey)**  
**Judge**

Srinagar  
17.06.2021  
Amjad Lone PS

- i. Whether the Judgment is reportable? Yes/ No.
- ii. Whether the Judgment is speaking Yes

Pronounced today on 17<sup>th</sup> June, 2021, in terms of Rule 138 (3) of the Jammu and Kashmir High Court Rules, 1999.

**(Sanjeev Kumar)**  
**Judge**

