

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

...
CRMC no.34/2019
IA no.01/2019

Reserved on: 09.08.2021

Pronounced on: 25.08.2021

Irshad Ahmad Sofi

.....Petitioner(s)

Through: Mr Abu Owais Pandit, Advocate

Versus

Afshana Shah

.....Respondent(s)

Through: Mr T.H.Khawja, Advocate

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Setting-aside of the Order dated 19th September 2018, passed by Forest Magistrate (Judicial Magistrate 1st Class), Srinagar (for brevity "*Trial Court*") passed in a petition under J&K Protection of Women from Domestic Violence Act, 2010, as also Order dated 18th January 2019, passed by Additional District Judge, Srinagar (for short "*Appellate Court*") in Cross Appeals, on the grounds made mention of therein.
2. I have heard learned counsel for parties and considered the matter.
3. Learned counsel for petitioner states that impugned order of the Trial Court qua granting interim monthly maintenance of Rs.4,000/- in addition to maintenance granted to child by the court of Sub-Judge, 13th Finance, is bad. It is contended that Trial Court has lost sight of proviso to Subsection (2) of Section 12 read with Subsection (3) of Section 26, where it is duty of the person that he has to inform the court trying application under Domestic Violence Act about any maintenance given to the said person. According

to him informing the court as regards maintenance already granted to aggrieved person, is not just a mere formality but carries a purpose that maintenance granted by one court has to be considered and is to be deducted by other court.

4. Learned counsel for petitioner also avers that both Trial Court as well as Appellate Court have not taken into consideration the fact that no maintenance was prayed for the child nor was minor party before the Trial Court. As has been said by counsel for petitioner, both Trial Court as well as Appellate Court have made observations contrary to the law, more particularly Subsection (3) of Section 26 of Domestic Violence Act.
5. It is discernible from the record that on an application, preferred by respondent, the court of Sub-Judge/Special Mobile Magistrate, Srinagar, vide Order dated 13th September 2019, held respondent herein entitled to monthly interim maintenance of Rs.3500/-.
6. Another application under Domestic Violence Act had also been preferred by respondent before Trial Court, in which order dated 19th September 2018 was passed, declining payment of maintenance to respondent herein. However, petitioner was directed to pay an amount of Rs.4000/- per month to the minor. Against aforesaid order, Cross Appeals were preferred. The Appellate Court found that amount of maintenance fixed by Trial Court vis-à-vis minor was not too excessive. The Appellate Court disallowed appeal of respondent to the extent where respondents 2 to 6 were deleted from the array of respondents, has been disallowed and Trial Court order to this extent has been maintained. However. The Appeal to the extent where the Trial Court dismissed respondent's claim for maintenance has been allowed

and order to this extent has been set-aside and Trial Court has been directed to hear the parties afresh in the matter or the Trial Court to ask parties to lead evidence to prove their respective claims. Appeal filed by petitioner to the extent where quantum of monetary relief of Rs.4000/- granted in favour of minor child, has been rejected and the Trial Court order to this extent has been maintained. Petitioners is aggrieved of both the orders of the Trial Court as well as Appellate Court.

7. Appellate Court while deciding the appeal of both petitioner as well as respondent has given an elaborate, comprehensive and lucid judgement. The Trial Court has discussed all the aspects of the matters as were required to be looked into and squared off. The Trial Court has expansively discussed provisions of Domestic Violence Act and has said that aggrieved person (respondent herein) is at liberty to pursue any of the legal remedies which are available to her and even if she has filed a petition under Section 488 Cr. P.C. she is not barred from pursuing the remedy under the provisions of Domestic Violence Act inasmuch as Section 26 of the Act provides that in addition to any petition filed under the provisions of Domestic Violence Act, an aggrieved person can seek her legal remedy before any other court of competent jurisdiction. The Appellate Court has rightly said that husband or father cannot make excuses in making payment of maintenance to his wife and children. Petitioner cannot make hard to believe contentions in paying maintenance to his wife and child.
8. It may be mentioned here that if a person, notwithstanding having sufficient means, neglects or refuses to maintain his wife, his minor child, he can be directed by a Magistrate of a first class, to make monthly allowance for

maintenance of his wife or child at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Section 488 of the Code of Criminal Procedure, which is *pari materia* to Section 125 of the Code of Criminal Procedure (Central) is one of the most invoked and discussed provisions of the Code. It provides that any person, who has sufficient means to maintain himself, cannot deny maintenance to his wife and children. The object is to prevent vagrancy and destitution. It provides a speedy remedy for supply of food, clothing and shelter to deserted wife. The term 'wife' in Section 125 of the Code of Criminal Procedure includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is thus brought within the inclusive definition of the term 'wife' consistent with the objective. Thus, in those cases where a man, who lived with a woman for a long time and even though they may not have undergone legal necessities of a valid marriage, should be made liable to pay the woman maintenance if he deserts her. The man should not be allowed to benefit from the legal loopholes by enjoying the advantages of a *de facto* marriage without undertaking the duties and obligations. Any other interpretation would lead the woman to vagrancy and destitution, which the provision of maintenance in Section 125 is meant to prevent.

9. It is apropos to supplement in the above *milieu*, that the Committee on Reforms of Criminal Justice System, headed by Dr. Justice V. S. Malimath, in its report of 2003 opined that evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the

presumption that the marriage was performed according to the customary rites of parties. Thus, it recommended that the word 'wife' in Section 125 Cr.P.C. should be amended to include a woman who was living with the man like his wife for a reasonably long period. The Constitution Bench of the Supreme Court in *Mohammad Ahmed Khan v. Shah Bano Begum and others, 1985 (2) SCC 556*, considering the provision of Section 125 of the 1973 Code, opined that the said provision is truly secular in character and is different from the personal law of the parties. The Supreme Court further held that such provisions were essentially of a prophylactic character and cut across the barriers of religion and that the liability imposed by Section 125 to maintain close relatives, who are indigent, is founded upon the individual's obligation to the society to prevent vagrancy and destitution.

10. In the present case, grounds taken in petition on hand do not offer any ground, muchless cogent or material one, to set-aside impugned order. Petitioner cannot deny paying maintenance to his wife and/or child. He is otherwise obliged to make payment of maintenance to them. Petition on hand unequivocally reflects and portrays disinclination on the part of petitioner to pay maintenance that has been directed by courts below to be paid by him. Resultantly, petition on hand is liable to be dismissed.

11. For all that has been said above, the instant petition is **dismissed** with connected CM(s). Interim direction, if any, shall stand vacated.

(Vinod Chatterji Koul)
Judge

Srinagar
25.08.2021
Ajaz Ahmad, PS

Whether the order is reportable: Yes/No.