



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 3750 OF 2023

Rajabali Shabbir Wishiwala and Anr.

... Petitioners.

Versus

State of Maharashtra and Anr.

... Respondents.

Ms. Nazneen Shahjahan Baig for the Petitioners.

Ms. Shilpa Gajare, APP for the Respondent No.1 State.

Mr. Jitendra Ahuja, for the Respondent No.2.

Coram : Sharmila U. Deshmukh, J.

Date : April 16, 2024.

P. C. :

1. Heard.

2. The present petition takes exception to the order dated 1st July, 2023 passed in Criminal Misc. Application No.1056 of 2015 by which the order passed on 30th April, 2016 came to be modified by removing the words "as per compromise".

3. Learned counsel appearing for the Petitioners submits that Criminal Misc. Application No.1056 of 2015 was filed by the Respondent No.2-Wife in the month of April, 2015. She submits that by virtue of a compromise entered into between the parties, an application came to be moved by the Respondent-wife in the said

Criminal Misc. Application No.1056 of 2015 and by order dated 30th April, 2016, the learned Judicial Magistrate First Class permitted the withdrawal of the DV Application in view of the compromise. She submits that the order of withdrawal dated 30th April, 2016 was passed on the Affidavit in support of petition Exhibit-5 and on 30th April, 2016, the learned Judicial Magistrate First Class in the presence of the parties as well as their Advocates recorded that there was a voluntary compromise between the parties and in accordance with the compromise, the order upon Exhibit-1 is passed. She submits that it is clear from the said order below Exhibit-5 that the withdrawal was on account of the compromise taken place.

4. She further submits that despite the withdrawal a second application came to be filed under the Protection of Women from Domestic Violence Act, 2005 being Criminal Application No.180 of 2016. She submits that in the year 2023, an application was moved by the Respondent No.2-wife for recall and correction of the typographical error in the order of 30th April, 2016 under Section 362 of the Code of Criminal Procedure, 1973. She submits that without notice to the petitioner-husband, the learned Judicial Magistrate First Class by order dated 1st July, 2023 removed the word “compromise” from the order of 30th April, 2016 and passed the fresh order of

simpliciter withdrawal of complaint. She submits that the record and proceedings indicated that the alleged application below Exhibit-5 annexed at Page 59 of the petition is not part of the record and she has obtained a certified copy of the same. She submits that the said application was not the application which was preferred earlier below Exhibit-5, which is evident from the order dated 30th April, 2016.

5. *Per contra*, learned counsel appearing for the Respondent No.2-wife would submit that on 30th April, 2016, the application at page No.59 was the application below Exhibit-5 which was filed by the respondent-wife seeking withdrawal of the DV proceedings as the Respondent-wife's child was an infant and it was not possible for her to remain present on every date of hearing. He submits that no settlement between the parties had taken place and as the order wrongly recorded that the application has been withdrawn by virtue of a compromise, the subsequent application of 26th June, 2023 came to be filed under Section 362 of the Cr.P.C.

6. In view of the dispute which had arisen as indicated above by order of 1st February, 2024, this Court had called for the record and proceedings of Criminal Misc. Application No.1056 of 2015 from the Court of Judicial Magistrate First Class, Cantonment Court, Pune. As per the proceedings received, it is stated that the "D" file is destroyed.

Perusal of the proceedings which have come before this Court shows that the first order below Exhibit-1 dated 30th April, 2016 permits the withdrawal of the application by mentioning the word “compromise” whereas by order of 1st July, 2023, the order is modified by removing the word “compromise” from the order of 30th April, 2016. The dispute between the parties is whether Exhibit “5” is the application filed by the Respondent-wife annexed at Page 59 of the Petition or Exhibit “5” is the affidavit in support of the petition. It is also not clear from the record and proceedings as to whether the order which is annexed at Page 37 of the petition is the order passed below Exhibit-5. The two orders which forms the part of the record and proceedings are the orders passed below Exhibit-1 in view of the order passed below Exhibit-5. The order dated 30th April, 2016 annexed at Page 37 of the petition below Exhibit-5 is not found in the record and proceedings.

7. In light of the above, the learned Judicial Magistrate First Class, Cantonment Court, Pune is directed to conduct an inquiry to verify whether the order annexed at Page 37 of the Petition is the order passed on 30th April, 2016 and whether the Application at Page 59 of the Petition is the application below Exhibit “5”. The Judicial Magistrate First Class is requested to submit a report to this Court after verifying the above issues. The report to also submit an

explanation as to absence of the order passed under Exhibit "5" in the Record and Proceedings sent to this Court.

8. Let the report be submitted to this Court within a period of eight weeks from today.
9. Registry to send the record and proceedings back to the Judicial Magistrate First Class, Cantonment Court, Pune alongwith copy of the petition.
10. Stand over to **11th June, 2024.**

[Sharmila U. Deshmukh, J.]