

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. No. 452 of 2008 & CRL. M.A. Nos. 13069 of 2008, 13736 of 2008, 14326 of 2008, 14664 of 2008, 14838 of 2008, 14839 of 2008 & 139 of 2009.

Judgment reserved on: January 12, 2009

Date of decision: January 16, 2009

NIDHI KUMAR GANDHI

..... Petitioner
in person.

versus

THE STATE & ORS.

..... Respondents
Through Mr.G.P.Thareja, Advocate.

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

Dr. S.Muralidhar, J.

1. This petition under Section 482 of the Code of Criminal Procedure 1973 ('CrPC') challenges an order dated 2nd February 2008 passed by the learned Additional Sessions Judge ('ASJ'), Rohini, Delhi in an application for interim relief in Crl. Appeal No. 2 of 2008. By the said impugned order the learned ASJ stayed the operation of the order dated 20th December 2007 passed by the learned Metropolitan Magistrate ('MM') to the extent that the Respondent herein was directed to restore the status quo ante in relation to the Petitioner's possession of the portion of the house at No. C-36, Pushpanjali Enclave, Pitampura, Delhi-110034, as on 16th April 2007, a day

prior to her eviction therefrom. . The Petitioner was further restrained by the impugned order of the learned ASJ from interfering with the possession of the said house.

2. The facts in brief leading to the filing of the present appeal are that the Petitioner on 5th October 2007 filed an application in the Court of the learned Additional Chief Metropolitan Magistrate ('ACMM') under Section 12 of the Protection of Women from Domestic Violence Act, 2005 ('Act'). The Petitioner stated in the said application that she had been forcibly thrown out from her matrimonial home at C-36, Pushpanjali Enclave, Pitampura, Delhi-110034 along with her minor daughter on 17th April 2007. It was further stated in the said application that at the time of her stay in the matrimonial home, she was in possession of one bed room attached with bath room, kitchen, store room and open terrace in front of bed room having separate entrance from main gate at ground floor. Among the reliefs sought in the application was a residence order allowing the Petitioner to enter the matrimonial home from where she had been evicted. The Petitioner also sought payment of maintenance from the Respondent husband Shri Saket Kumar Gandhi, the Respondent No.2 in the present petition. In terms of Section 23 (2) of the Act the Petitioner also filed an affidavit reiterating the above averments.

3. After notice was issued in the application, a reply was filed by the Respondents claiming that the matrimonial home was in the name of the

father of Respondent No.2 (who is arraigned as Respondent No.3 in the present petition). It was mentioned that the Respondent No.2 had already filed a separate application for restitution of conjugal rights and was willing to take back the Petitioner in the matrimonial home. It was further stated that Respondent No.2 was at present living separately at not at C-36, Pushpanjali Enclave, Pitampura, Delhi.

4. After hearing learned counsel for both sides, learned MM observed that Respondent No.2 had shifted his address only after the filing of the petition under the Act. The learned ACMM noted that the Petitioner and the minor daughter were living with her father at Gurgaon. It was felt necessary to issue an interim direction that “the Petitioner would be entitled to visit the matrimonial home and would be entitled to the custody and possession of the same room/some extent of premises as she was putting up just immediately prior to leaving the said premises i.e. on 16th April 2007 one day prior to the leaving.” The learned MM also directed payment by Respondent No.2 of maintenance of Rs.3500/- per month to the Petitioner and Rs.1,000/- per month to the minor daughter. The petition was directed to be listed on 17th March 2008 for further proceedings.

5. It appears from the record that on 21st December 2007 possession was given to the Petitioner of the bed room on the first floor of the premises. It was stated in the memo drawn up on that date that the “keys of the middle door and main entrance were to be provide by Mr. Rajender Kumar Gandhi

[Respondent No.3-father-in-law of the Petitioner] within two weeks and that during this time Mr. Gandhi had promised to provide entrance at any time.” Subsequently, on 26th December 2007 the key of the small space outside the concerned bed room in which washing machine was kept before was handed over to the petitioner.

6. Aggrieved by the order dated 20th December 2007 the Respondents herein filed Crl. Appeal No.2 of 2008 in the court of the learned ASJ. Relying on the judgment of the Supreme Court in ***S.R. Batra v. Taruna Batra (2007) 3 SCC 169*** it was contended by them that the expression “shared household” occurring in Section 2(s) of the Act did not include the present premises since it was owned exclusively by the father. It was submitted that the right of appeal was been sought to be rendered infructuous by the petitioner herein by getting the order dated 20th December 2007 executed even without waiting for the expiry of the statutory period of 30 days for filing of the appeal under Section 29 of the Act. The award of maintenance was also challenged in the appeal.

7. The learned ASJ by the impugned order disposed of the application filed by the respondents in their pending appeal seeking interim reliefs. It was held by the learned ASJ in the impugned order dated 2nd February 2008 that since the premises in question was neither owned nor rented by the husband and was not a joint family property, it was not a “shared household”. It was held that prima facie the Petitioner die not have a right

of possession of the portion of the premises that were under her occupation prior to her eviction. It was further observed that the Petitioner ought to have waited till the expiry of the limitation period for filing an appeal before getting the order dated 20th December 2007 of the learned MM implemented. The learned ASJ further observed that no procedure has been prescribed in terms of Section 28(2) of the Act and therefore devising its own procedure the learned ASJ directed restoration of the status quo ante as on 20th December 2007 as regards the possession. The said order was directed to continue till the disposal of the appeal. The award of maintenance was left undisturbed. Aggrieved by the said order of the ASJ, the present petition was filed.

8. At the first hearing of this petition on 8th February 2008 this Court directed stay of the operation of the impugned order dated 2nd February 2008. Thereafter on 2nd May 2008 the following order was passed by this Court:

“1. Learned counsel for the Respondent Nos. 2 to 4 states that the Respondent Nos. 2 to 4 are willing to explore the possibility of a settlement through mediation. However, learned counsel for the Petitioner as well as Petitioner who is present in Court state that in the absence of any concrete proposal from the Respondent Nos. 2 to 4, and with the Petitioner not yet being allowed facilities in the matrimonial home pursuant to the order dated 20th December 2007 passed by the learned Metropolitan Magistrate, Delhi, the Petitioner is not willing to go in for mediation at this stage.

2. The Petitioner further states that notwithstanding the order dated 8th February 2008 passed by this Court staying the impugned order of the learned ASJ she does not have access to a kitchen where she can cook and therefore she is unable to reside in the room, the possession of which has been given to her, along with her minor daughter. The Petitioner is permitted to file an affidavit and an appropriate application for directions in this regard.

3. In view of the statement made today by the petitioner, the learned counsel for Respondent Nos. 2 to 4 states that he needs time to file a reply to the petition. Reply be filed within four weeks. Rejoinder thereto, if any, be filed within two weeks thereafter.

4. List on 9th July 2008.

5. The interim order dated 8th February 2008 will continue till the next date of hearing.

6. A copy of order be given dasti to learned counsel for the parties.”

9. At the subsequent hearing on 30th July 2008 the Court noted the submission of the Petitioner that she had not been given access to the kitchen and the Respondents were also not giving the duplicate keys of the main gate and entrance. It was contended in reply by Mr. Thareja, learned counsel appearing for the Respondents that while the Respondents would not give the Petitioner any duplicate key she could always exit and enter the main

door and gate “at reasonable hours”. He further stated that there was no kitchen on the first floor. In that context the Court directed the Respondent to file the sanctioned plan of the first floor. The sanctioned plan of the premises was thereafter placed by the parties before the Court and has been perused by the Court.

10. The petitioner who appears in person submits that she cannot be expected to reside with her minor child without the benefit of a kitchen and that prior to her being evicted she was enjoying the facility of a kitchen. Moreover, the store room on the first floor near the passage is not being used by anyone as at present. She further submits that at an interlocutory stage the learned ASJ ought not to have passed the impugned order which virtually amounts to allowing the appeal itself. Mr.Thareja, learned counsel for the Respondents on the other hand raises a preliminary objection to the maintainability of this petition. According to him the impugned order is of a civil nature and therefore a petition under Section 482 CrPC was not maintainable. Alternatively it is submitted that if there was no remedy provided under the Act against the impugned interim order then the petition under Section 482 CrPC cannot be filed for seeking such remedy. Thirdly it was submitted that the premises in question was not a “shared household” in terms of the judgment of the Supreme Court in ***S.R. Batra***. Finally, it was submitted that through the present proceedings the Petitioner was seeking to enlarge the scope of the proceedings before the learned MM and was trying to get possession of a kitchen which was not earlier in her possession.

11. As regards the objection as to maintainability of the present petition, this Court finds that the powers under the Act have been vested in the Magistrate in the first instance. This is plain from a reading of the Chapter IV of the Act. It is the Magistrate who has been empowered to hear and dispose of the applications for various reliefs. In fact under Section 29 of the Act an appeal has been provided to the court of Sessions from the order of the Magistrate. This being the scheme of the Act the submission that no relief in the criminal jurisdiction of the High Court can be sought by way of a petition under Section 482 CrPC is wholly misconceived. Mr.Thareja was unable to provide any provision under the Act which provides for an alternative remedy to the Petitioner. When in the view of this Court the impugned order would cause a grave miscarriage of justice, this Court is not powerless in exercise of its powers under Section 482 CrPC read with Article 227 of the Constitution to interfere. Accordingly this Court rejects the objection as to the maintainability of the present petition.

12. As regards the merits of the case it is seen from the sanctioned plan submitted that there is an unfurnished room indicated as 'kitchen/store' on the first floor which at present is unoccupied and this is adjoining the passage. Although Mr. Thareja states that there is no water facility in the said room and that it cannot be used as a kitchen, the Petitioner appearing in person states that she will use it for the said purpose to the extent that she can as long as her right to a separate entrance from the ground floor and

duplicate keys to the main entrance and main door are provided to her. The parties admit that the small space where the washing machine was earlier kept is unsuitable for the purposes of a kitchen.

13. On a conspectus of the proceedings, this Court finds that the learned ASJ ought not to have interfered with the order dated 20th December 2007 of the learned MM restoring to the Petitioner the possession of the premises in her occupation prior to 17th April 2007 particularly at the interim stage. It was premature on the part of the learned ASJ to have straightaway proceeded to apply the law explained by the Supreme Court in ***S.R. Batra v. Taruna Batra*** without any evidence having been led to determine whether in fact the Respondent No.2 owned the premises and that the husband had absolutely no right to live there. It is indeed inconceivable how at an interlocutory stage where, given the purposes of the Act, the question before the learned MM is of giving urgent relief, a final determination can be made on these aspects. It must be remembered that in this case it is not as if the family of the husband is being dispossessed of the portion under their occupation entirely. The Petitioner is only seeking restoration of a relatively small portion which was under her occupation prior to 17th April 2007. In the facts and circumstances, the learned ASJ erred in interfering with the interlocutory order passed by the learned MM. Further, given the situation in which the Petitioner was placed, no fault can be found with her seeking to implement the order dated 20th December 2007 forthwith. By granting to the Respondents a final relief in relation to the issue of residence, the impugned

order of the learned ASJ has resulted in a grave miscarriage of justice as far as the Petitioner is concerned.

14. For the aforementioned reasons, the impugned order dated 2nd February 2008 passed by the learned ASJ is set aside and the order dated 20th December 2007 passed by the learned MM is restored. It is directed that the Petitioner will in addition to the portions of the premises in question which were handed over to her on 21st December and 26th December 2007, be put in vacant and peaceful possession of the room in the first floor shown in the plan as 'kitchen/store' adjoining the passage and measuring 8 feet and 7½ inches x 9 feet and 6½ inches. In addition, she will be given the duplicate keys of the main gate as well as to the main entrance leading to the first floor. The Respondents will not in any manner block the access of the Petitioner and her infant child to the aforementioned portions. They will also ensure that the existing electricity and water connections to the said portions are continued. The above directions will be complied with within a period of seven days from today.

15. The learned ASJ is now directed to dispose of the appeal on the question of maintenance within a period of two months from today. Till the disposal of the appeal the present order will continue to operate as the interim order. It is clarified that the observations in this order are only for the purposes of determining the interim relief to be granted to the Petitioner pending disposal of the appeal before the learned ASJ and will not influence

the disposal of the appeal by the learned ASJ on its merits and of the petition before the learned MM.

16. The petition is accordingly allowed with costs of Rs.5,000/- which shall be paid by the Respondents to the Petitioner within a period of four weeks from today. All the pending applications also stand disposed of.

17. A copy of this order be given dasti to learned counsel for the parties.

S.MURALIDHAR, J

JANUARY 16, 2009
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