

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 27th March, 2012

Judgment delivered on: 17th April, 2012

+ **CRL.M.C. 4282/2011 & Crl. M.A. No. 19670/2011 (stay)**

KAVITA DASS

..... Petitioner

Through: Mr. Vikas Pahwa, Sr. Advocate with
Mr. Rohan Garg, Mr. Samarjit Pathwal and
Mr. Arjun Mahajan, Advs.

versus

NCT OF DELHI & ANR

..... Respondents

Through: Ms. Rajdipa Behura, APP for the
R-1/State with SI Rampal Singh, PS Defence
Colony
Mr. K.K. Manan, Mr. Nipun Bhardwaj,
Mr. Navender and Mr. N. Gautam, Advs. for
R-2.

AND

+ **CRL.M.C. 4283/2011 & Crl. M.A. No. 19672/2011 (stay)**

KAVITA DASS

..... Petitioner

Through: Mr. Vikas Pahwa, Sr. Advocate
with Mr. Rohan Garg, Mr. Samarjit Pathwal
and Mr. Arjun Mahajan, Advs.

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Mr.Navender and Mr. N. Gautam, Advs. for
R-2.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide this common judgment, I shall dispose of both the above mentioned petitions.
2. The petitioner has sought to quash FIR No.157 dated 07.12.2011 registered under Section 448 Indian Penal Code, 1860 at PS. Defence Colony, New Delhi against petitioner/wife and to set aside order dated 28.11.2011 passed by learned Additional Sessions Judge, Saket District Courts, New Delhi in Appeal CA No.35/11 in case titled 'Kavita Dass Vs Ranjit Dass'.
3. Brief facts of the case are that the petitioner got married to respondent No.2 on 26.12.1975 at Delhi. After marriage, the petitioner and respondent No.2 lived together in abroad (Sri Lanka and Australia) as husband and wife for 12 long years. Two sons were born out of the said wedlock in 1978 and 1981 respectively. The elder son Rajad Das is married and settled in London while the younger son has been living in Delhi.

4. In 1992, the respondent No.2 acquired a license to start his own company in the name & style of 'Forex Company'. Accordingly, the couple came back to India and started living in a rented accommodation bearing address C-293, Defence Colony, New Delhi. During their stay in India, the respondent No.2 came in contact with another woman, a spinster and fell in love with her. This was a flash point in the relationship. All efforts were made by the petitioner to convince the respondent No.2 to give up the illicit liaison with another woman, however, failed.

5. The situation further became worst. The respondent No.2 as a part of a well planned act, sometime in July, 2009 left the premises C-293, Defence Colony, New Delhi and abandoned the petitioner/wife. Thereafter, respondent No.2 in connivance with the then landlord, got an eviction order in a suit filed against himself as well as the petitioner/wife. The aforesaid suit for eviction was decided ex parte in favour of the then landlord, accordingly, petitioner was forced to leave the shared household, i.e. C-293, Defence Colony, New Delhi on 25.08.2010.

6. After the eviction, the petitioner was literally came on road and was forced to take shelter at her brother-in-law's house at C-52, Defence Colony, New Delhi. Petitioner stayed there from 25.08.2011 till 16.04.2011. Around July, 2009, the respondent No.2 after abandoning the petitioner, filed a divorce petition bearing No.1079/2009 against her which is pending before Ld. Additional

District Judge, Saket District Courts, New Delhi.

7. In addition to the divorce petition, the respondent No. 2, around September, 2009 coerced and virtually cajoled the petitioner to sign an out of court memorandum of understanding (MOU) by absolutely fraudulent means of representation, wherein, the respondent No. 2 had stated that he would pay the permanent alimony of Rs.45lacs to the petitioner against a divorce by mutual consent.

8. Accordingly, on the basis of the aforesaid MOU, the respondent No. 2 filed a petition for divorce and dissolution of marriage on the basis of mutual consent, however, till date not even the first motion has taken place as the petitioner realized that her signatures on the MOU were obtained by fraudulent representations. As such she did not act upon the said MOU being well within her rights to do so.

9. The petitioner was compelled and constrained to approach trial court with complaint filed under section 12 of the Domestic Violence Act, seeking interim measures and interim relief in accordance with provisions of the said Act and in the facts and circumstances of the case, the trial court vide interim order dated 10.09.2010 directed the respondent No. 2 to pay an amount of Rs.10,000/- to the petitioner as an interim maintenance, as well as monthly rent of Rs.25,000/- from the date of petitioner's eviction from the then shared household.

10. Subsequently, the petitioner in the month of April, 2011 came to know that the respondent No. 2 had taken another premises bearing

address D-12, Defence Colony, New Delhi on rent. Accordingly, on 17.04.2011, she entered in to her new matrimonial home D-12, Defence Colony, New Delhi with the help of Protection Officer Ms.Preeti Saxena, who handed over to her the keys of the front door, bedroom door and balcony door from the respondent. Since then, the petitioner has been residing with respondent No.2 at the aforesaid rented shared accommodation.

11. Thereafter, the petitioner on 18.04.2011, moved an application in the court of Ld. MM, Ms. Pooja Talwar, Saket District court seeking protection against her removal from the aforesaid shared household i.e D-12 Defence Colony, New Delhi. An interim order dated 19.04.2011 u/s 17 and 19 of the D.V. Act was passed by the above named Ld. Magistrate, whereby the petitioner was granted right to live with the respondent No.2 in above mentioned shared household. However, subsequently, Ld. MM vide order dated 28.04.2011 vacated the earlier order dated 19.04.2011.

12. In the order dated 28.04.2011, Ld. MM observed that the present premises was not a shared household. The petitioner while signing the MOU was fully aware that she had to vacate the said premises, therefore, there was no reason for the petitioner to enter the house of respondent No.2 forcefully, accordingly, the Ld. MM directed that the petitioner may be removed from the premises by taking due recourse of law.

13. Mr. Vikas Pahwa, Ld. Senior Advocate appearing on behalf of the petitioner submitted that the petitioner was forced to give an out of court undertaking on 05.06.2011 stating that she will vacate the premises as directed by the Ld. Trial court. Subsequently, the petitioner, against order dated 28.04.2011, filed an Appeal under Section 29 of the Protection of Women from Domestic Violence Act, 2005 before Ld. Sessions Court, Saket District Court, New Delhi. Smt.Raj Rani Mitra, Ld. ASJ, Saket Courts, New Delhi, granted an ex-parte stay on order of Ld. MM dated 28.04.2011, which was subsequently vacated vide order dated 09.06.2011 passed by the Ld. Additional Sessions Judge on an application of respondent No.2, and the matter was transferred to Sh. A.K. Garg, Ld. ADJ, Saket District Courts, New Delhi, which court was in seize of a connected appeal in the same matter.

14. Sh. A.K. Garg, Ld. ASJ, Saket Courts heard the arguments in Appeal No.35/11 and reserved for order on 12.10.2011. Thereafter, Ld. ASJ adjourned the pronouncement on 13 occasions before finally dismissing the appeal and upheld the Ld. MM's order dated 28.04.2011, whereby, the petitioner was directed to be removed from Respondent No.2/husband's rented premises on the ground that the said premises was not a shared household and the petitioner had no right to enter the said premises forcefully.

15. Ld. counsel for the petitioner further submitted that FIR No.157 dated 07.12.2011 registered at P.S. Defence colony, is legally and

factually unsustainable in law. Ld. ASJ has committed a serious error in ignoring the fact that the house in question was a matrimonial home and shared household. Moreover, no evidentiary value can be given to out of court settlement deed entered into between the parties, which MOU was signed by the petitioner under duress.

16. Further submitted that no divorce has taken place between the parties, therefore, the petitioner has legal right to stay with her husband, it being her matrimonial home.

17. Further Ld. Counsel for the petitioner refers to a judgment passed by Hon'ble Supreme Court in a case titled as “**S R Batra and Anr. Vs. Smt.Taruna Batra**” reported in (2007) 3 SCC 169, wherein, it was held as under:-

“....a ‘shared household’ would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member...”

“.....the definition of ‘shared household’ in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society”.

18. Further refers to a case decided by Hon'ble Supreme Court in **Vimlaben Ajitbhai Patel Vs. Vatslaben Ashokbhai Patel** reported in (2008) 4 SCC 649 , wherein, it was observed as under :-

“....The Domestic Violence Act provides for

a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share...”

19. On perusal of the impugned order, Id. Judge was of the view that in no circumstances, D-12, Defence Colony can be said to be shared household. In addition to that since both the parties never resided together in the said house, therefore, that house cannot be termed as shared household as per provision of Section 2(f), 2(s) r.w.S. 17 of PWDV Act. When the order was being dictated, counsel for the appellant had appeared and stated that though the MOU was executed between the parties but the complainant did not wish to abide by the same for the reasons known to the appellant. It was mentioned in the order dated 18.04.2011, that the respondent was fully aware that she had to vacate the earlier premises, therefore, there was no reason for her to enter the house of the respondent forcefully, since the said house cannot be said to a ‘shared household’, therefore, she may be removed from the premises by taking recourse to due process of law.

20. It was further observed in the order passed by Id. Additional Sessions Judge, Saket courts, New Delhi, while deciding the appeals of the appellant that the appellant’s main grievance is that the order has been passed for registration of the FIR u/s 31 of the Act which the magistrate is not empowered under the Act because the word ‘respondent’ is specifically defined in the Act. Under the Act

respondent means an adult male person and it is very clear that the respondent would be a person from the family of the husband only in the case the applicant is a wife.

21. Protection order was obtained u/s 18. It is true that D.V. Act has been enacted to provide for more effective protection of the right of women guaranteed under the constitution who are victim of the violence of any kind. Section 2(a) of the Act defines the aggrieved person. Aggrieved person means any women who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of violence by the respondent.

22. It was further observed by Ld. Additional Sessions Judge that the appellant had entered in the house of the respondent without having any right, therefore, in these circumstances, order passed by Ld. MM on 10.06.2011 is deemed to be an order passed u/s 448 Indian Penal Code, 1860 for the offence of house trespass. In view of that, both the appeals of the appellant was dismissed with direction to register an FIR u/S 448 Indian Penal Code, 1860 against the appellant.

23. Mr. K.K. Manan, learned counsel appearing on behalf of respondent No. 2 submits that respondent No. 2 and the petitioner entered in MOU and the respondent No.2/husband agreed to pay a sum of Rs.45 lacs to the appellant with the condition that she agreed to grant divorce by mutual consent. However, she did not come forward for the same and the present house, which is on rent is not shared

household. She had neither complied with the conditions of MOU nor had she complied with order passed by learned trial court.

24. Further submitted that the impugned order does not suffer from any illegality and therefore, the instant petitions may be dismissed with exemplary costs.

25. Ld. Senior Counsel for petitioner on rebuttal submitted that the courts below have wrongly passed the orders by directing SHO concerned to lodge FIR under Section 448 Indian Penal Code, 1860.

26. Ld. Counsel further refers to Section 441 of Indian Penal Code, 1860 according to which the trespass should be with intention to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence.

27. The petitioner herein did not entered in anybody's property, but it was the house of her husband and entered with the help of Protection Officer under the protection of Domestic Violence Act. Therefore, she rightly entered the house which is her matrimonial house.

28. Therefore, he submitted that the case against the petitioner cannot be lodged for the criminal trespass. In Section 442 of IPC, the definition of house trespass is given, which reads as under:-

“Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

29. In the instant case, the petitioner is legally wedded wife of respondent No. 2, there is no divorce taken place, she entered into the house of respondent No.2 with no intention of committing offence and the petitioner has not committed any offence. Therefore, both the court i.e. Trial and appellate court have gone wrong by directing her to vacate the house which was taken on rent by her husband/respondent No.2 and to lodge an FIR against her.

30. Presently, where a woman is subjected to cruelty by her husband or his relative, it is an offence committed under Section 498A of Indian Penal Code, 1860. The Civil Law does not further address this phenomenal in its entirety. Therefore, it is by virtue of Protection of women against Domestic Violence Act, which interalia seeks to provide as under :-

(s) " shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a

household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;”

31. I have noted that in the judgment delivered by Hon’ble Supreme Court in the matter of **Smt. Kanwal Sood Vs. Nawal Kishore and Anr. (1983) 3 SCC 25**, referred to by learned counsel for the petitioner, it has been observed as under :-

“10 It may be pointed out that the appellant was allowed to occupy the premises in 1967 by Shri R.C. Sood. Under the terms of gift-deed Shri Sood was entitled to remain in occupation of the premises during his life time. He could as well grant, leave and licence to p the appellant to occupy the premises along with him. Now the question arises about her status after the death of Shri R.C. Sood. At the most, it can be said that after the death of Shri Sood the leave and license granted by Shri Sood came to an end and if she stayed in the premises after the death of Shri Sood, her possession may be that of a trespasser but every trespass does not amount to criminal trespass within the meaning of section 141 of the Indian Penal Code. In order to satisfy the conditions of section 441 it must be established that the appellant entered in possession over the premises with intent to commit an offence. A bare persual of the complaint filed by Respondent No. I makes it abundantly clear that there is absolutely no allegation about the intention of the appellant to commit any offence or to intimidate, insult or annoy any person in possession, as will be evident

from three material paragraphs which are quoted below:

"2. That the late Shri R.C. Sood was occupying the said premises in accordance with clause No. I of a gift-deed executed by him in favour of Shri Anand Mayee Sangh and after his demise the said premises had to be delivered to Shri Anand Mayee Sangh.

3. That after the demise of Shri R.". Sood, the accused was repeatedly requested to voluntarily vacate and deliver the possession of the said premises to the Sangh but the accused paid no heed and hence a notice dated 13.11.1973, copy of which enclosed, was sent to the accused as required by U.P. Amendment of Section 448 I.P.C. the said notice was served upon accused on 14.11.73 as per postal A.D. receipt attached herewith.

4. That the accused was required to quit and vacate the said premises by the 20th day of November, 1973 but instead of vacating the premises the accused has been making unusual pretext and has thus committed an offence under section 448 I.P.C."

11 The appellant may be fondly thinking that she had a right to occupy the premises even after the death of Shri R.C. Sood. If a suit for eviction is filed in Civil Court she might be in a position to vindicate her right and justify her possession. This is essentially a civil matter which could be

properly adjudicated upon by a competent Civil Court. To initiate criminal proceedings in the circumstances appears to be only an abuse of the process of the Court.”

32. On perusal of aforesaid provisions and laws laid down by Hon'ble Supreme court, it includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband, whether he lives in an ancestral house or own acquired house or rented house. Therefore, if the respondent does not allow the aggrieved person then by taking shelter of the court, the Magistrate may pass the order so that she may enter in the house or she would not be thrown out from the house of his husband without due process of law. Certainly, not otherwise, as directed by the Ld. MM and upheld by the appellate court.

33. In my opinion, the court cannot ask the aggrieved person to vacate the house, even though, may be on rent. However, she cannot be directed to vacate the same without due process of law. The second direction of the court to register a case against the aggrieved person on not vacating the house of her husband is not only bad in law but is also against the mandate of the Act. The issue on shared household has already been decided by the Apex Court in case of S.R. Batra (supra).

34. The impugned orders passed by the two courts below i.e the court of Ld. MM and court of Ld. Additional Sessions Judge have defeated the very purpose of Act, and therefore, the instant petitions are allowed and the impugned order mentioned above are set aside.

35. Accordingly, the FIR No.157 dated 07.12.2011 registered under Section 448 Indian Penal Code, 1860 at PS. Defence Colony, New Delhi against petitioner/wife is quashed along with all the emanating proceedings there from.

36. Both the petitions are allowed and disposed of on above terms.

37. The applications for stay in both the petitions are disposed of being infructuous.

38. No order as to costs.

SURESH KAIT, J

APRIL 17th 2012

j