

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO. 23 OF 2015

Ms. Deborah Mary Crasto Leclerc,
aged 51 years, married,
Residing at House No.918/22-2,
Near V. P. Socorro, Porvorim,
Bardez, Goa.

.. Aggrieved Person/
Petitioner

Versus

Patrick Oliver Leclerc, aged
50 years, married, Residing at
S3-502, Romalina Classic Building,
Calizor, Moira, Bardez, Goa.

.. Respondent

Mr. J. A. Lobo, Advocate for the Petitioner.

Mr. R. Rao, Advocate for the respondent.

CORAM :- C. V. BHADANG, J.

Reserved on : 1st April, 2015.

Pronounced on : 10th April, 2015

JUDGMENT :

Admit.

2. Mr. Rao, the learned Counsel waives service.

3. Heard finally, with the consent of the learned Counsel
for the parties.

4. By this Revision Application, the petitioner/ original applicant - wife, is challenging the judgment and order dated 05/02/2015 passed by the learned Sessions Judge, dismissing the appeal filed by the petitioner and thereby confirming the order dated 07/10/2014 passed by the learned Judicial Magistrate, First Class, Mapusa in Criminal Case No. OA/58/DVA/2012/A.

5. The brief facts, necessary for the disposal of the appeal, may be stated thus :

That the petitioner is the wife of the respondent. They are blessed with three children, namely a daughter and two sons. The daughter is said to be under vegetative state on account of an accidental injury. The present dispute pertains to an order, by which, the learned Magistrate has allowed the applications filed by the respondent /husband, thereby issuing summons, asking the two sons, namely Scott Leclerc and Brett Leclerc to remain present as witnesses on behalf of the respondent. It appears that on account of a matrimonial dispute between the parties, the petitioner has filed an application on 23/01/2012 under the Protection of Women from Domestic Violence Act, 2005 (the Act, for short) before the learned Magistrate, Mapusa for various

reliefs. It is the material grievance of the petitioner that the respondent was indulging into acts of domestic violence. It is claimed that on certain occasions, the respondent had even assaulted the two sons, namely Scott Leclerc and Brett Leclerc in public place. It appears that, after the petitioner closed her side of the evidence, the respondent examined one Mark Anthony, an official from the Consulate as his witness. This was on 25/06/2014. The respondent is staying in France. It appears that subsequently, on 04/07/2014 and 09/07/2014, there was no appearance on behalf of the respondent. Hence, the learned Magistrate closed the evidence of the respondent on 19/07/2014. It is thereafter that on 01/08/2014 that the respondent filed two separate applications at exhibits D-55 and D-56, purportedly under Section 311 of the Criminal Procedure Code (Cr.P.C., for short) for summoning material witnesses. It was claimed that the sons Scott Leclerc and Brett Leclerc are material witnesses in respect of the enquiry. Scott Leclerc is said to be a minor while Brett Leclerc has attained majority. It was, therefore, prayed that a direction be issued to the petitioner to produce Scott Leclerc before the Court and for issuing a witness summons to Brett Leclerc.

6. The petitioner filed a reply to the applications, opposing the same. It was contended that the applications and the

prayers are in the nature of abuse of the process of the Court. It was also contended that the respondent is not an accused and as such, cannot claim the benefit of the provisions of Section 311 of Cr.P.C. It was denied that the two sons are material witnesses. It is contended that the respondent is using blackmailing tactics to pressurise and traumatise the minor sons. It was also contended that, the minor son Scott Leclerc was due to leave Goa on 22/23-08/2014 to proceed abroad and the respondent for his oblique purpose, cancelled the said trip, stating to the Airlines that his son Scott Leclerc was wanted in a criminal case.

7. It was contended that the respondent has not yet stepped into witness box and it is only after the said respondent steps into witness box, that the application filed can be considered. It was contended that the respondent is trying to drag the children into the rigors of the litigation, while he himself is shying away from deposing in the matter and is engaging into dilatory tactics. It is submitted that in such circumstances, no case for exercise of discretion under Section 311 of Cr.P.C. is made out.

8. The learned Magistrate, on hearing the parties, by an order dated 07/10/2014, allowed the applications at exhibits D-55

and D-56 in the following terms :

“30. In view of the above stated reasons, the applications are granted. Issue summons to Scott Leclerc and Brett Leclerc to give evidence in the matter. The summons addressed to Scott Leclerc shall contain a note that the applicant/aggrieved party is directed to produce said Scott before this Court for the purpose of his examination as a witness for the respondent. The respondent shall deposit bhatta charges of ₹200/- each and shall pray process fees within a period of two days.”

9. Feeling aggrieved, the petitioner filed Criminal Appeal No. 145/2014 before the learned Additional Sessions Judge, Mapusa. The learned Additional Sessions Judge, by a judgment and order dated 05/02/2015, has dismissed the appeal. The learned Sessions Judge was of the view that in order to elucidate the truth, the examination of the sons is necessary. The learned Sessions Judge also negated the submission that the witness summons cannot be issued, unless the respondent steps into the witness box. Feeling aggrieved by the same, the petitioner has approached this Court.

10. I have heard Shri Lobo, the learned Counsel for the

petitioner and Shri Rao, the learned Counsel for the respondent. With the assistance of the learned Counsel, I have perused the record and the impugned orders passed.

11. It is submitted on behalf of the petitioner that the respondent is not facing any trial as such, before the learned Magistrate and thus the provisions of Section 311 of Cr.P.C. were not attracted. It is next submitted that even assuming that the provisions of Section 311 were applicable, this was not a case wherein the learned Magistrate could have acted on the basis of the applications filed by the respondent in calling the two sons as witnesses. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of **Rajaram Prasad Yadav Vs. State of Bihar**, reported in AIR 2013 SC (Cri.) 1746. It is submitted that the respondent, without himself entering into the witness box, cannot justifiably pray for calling the two sons as witnesses, on a specious ground that they are material witnesses. It is submitted that the applications exhibits D-55 and D-56 are too cryptic to make out any case about the two sons being material witnesses, so as to elucidate the truth. He, therefore, submitted that order passed by the learned Magistrate clearly demonstrates exercise of jurisdiction with material irregularity, which needs interference.

12. On the contrary, it is submitted by Shri Rao, the learned Counsel for the respondent that in view of the case set up by the petitioner, about there being acts of assault by the respondent against the two sons in public place and also certain acts, which are attributed to the respondent in respect of the incidents, which have allegedly occurred in the presence of two sons, they would be witnesses, who may elucidate the truth. The learned Counsel was at pains to point out that the whole purpose of the enquiry before the Magistrate, is to find out the truth, as to whether the respondent has indulged into acts of domestic violence vis-a-vis the petitioner. The learned Counsel would submit that such a finding can only clothe the Magistrate with the necessary jurisdiction to grant the relief to the petitioner. The learned Counsel has taken me through the evidence of the petitioner, to point out certain allegations, in order to submit that the two sons would be material witnesses.

13. The learned Counsel has placed reliance on the decision of the **Madhya Pradesh High Court in Madhusudan Bhardwaj Vs. Mamta Bhardwaj**, reported in 2009 Cri.L.J. 3095 and in particular, paragraph 9 thereof, in order to submit that on cumulative reading of subsections (1) and subsection (2) of

Section 28 of the Act and Rule 6(5) of the Rules framed thereunder, it is evident that nothing in subsection (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 of the Act. It is thus submitted that the learned Magistrate was justified in issuing summons to the two sons and in the absence of any prohibition pointed out in this regard, no exception can be taken to the same. It is also submitted that the impugned order would not be rendered vulnerable only on the ground that the respondent has not yet examined himself. It is submitted that nothing prevents the learned Magistrate from permitting the witnesses to be examined before the party itself enters into the witness box. The learned Counsel also submitted that the petitioner has not demonstrated any prejudice, whatsoever by examination of the two witnesses. The learned Counsel also submitted that the fact that the petitioner is opposing the two sons to be examined, shows that she is not interested in bringing the truth to the fore. The learned Counsel also submitted that the impugned order passed by the learned Magistrate would be in the nature of interlocutory order, which will not be amenable to the revisional jurisdiction of this Court, in view of the bar contained under Section 397(2) of Cr.P.C. He, therefore, submitted that the Revision Application be dismissed.

14. I have given my anxious consideration to the rival circumstances and the submission made. It would be first necessary to briefly deal with the submissions on the maintainability of the Criminal Revision Application on the ground that the impugned order passed by the Magistrate would be interlocutory in nature. On consideration of the submissions, I am unable to persuade myself to hold that the impugned order would be in the nature of interlocutory order. It is trite that the term interlocutory order is not defined under the Cr.P.C. However, it is now well settled that an interlocutory order is not converse of a final order. In other words, every order, which is not final, would not necessarily be interlocutory in nature. There may be certain orders, which although not final, may still not be interlocutory. In my considered view, the impugned order would fall in the said category. This is because any order, which substantially or materially, affects/decides the rights of the parties, in relation to the material controversy in question, cannot be said to be interlocutory. Orders, which are purely incidental, for example, such as granting or refusing adjournment or which are in the nature of steps in aid, can be termed as interlocutory, so as to bar the revisional jurisdiction. A useful reference, in this behalf, may be made to the illustrated decision of the Hon'ble Supreme Court

in the case of ***Madhu Limaye Vs. State of Maharashtra***, 1978 Mh.L.J. 1. In such circumstances, in my considered view, the objection raised in this regard, has to be refuted.

15. This takes me to the merits of the controversy. It is a matter of record that the only witness so far examined by the respondent is an official from the Consulate. On two occasions thereafter, the respondent remained absent and ultimately, his evidence was closed on 19/07/2014. It is, thereafter, that on 01/08/2014 that the respondent filed an application for recalling the order, closing his evidence and two applications purportedly under Section 311 of Cr.P.C. for summoning the children as witnesses, which have been allowed. The respondent is yet to examine himself. The legal position about the nature of the enquiry under the provisions of the Act is no longer *res integra*. A reference, in this regard, may be made to the decision of this Court in ***Krishna Gopal Gupta and another Vs. Radhika Gupta and another*** in Criminal Writ Petition Nos. 70 and 76 of 2010, which *inter alia* holds that the provisions of the Act are mainly made for giving relief to the affected woman. The respondent in such a case is not an accused, until he commits breach of an order passed by the Court, under the provisions of the Act. Thus, it would appear that the substantive proceedings

under the Act are essentially of a civil nature. The perusal of the order passed by the learned Magistrate would also show that the Magistrate has noticed that the proceedings are civil in nature and it is only the disobedience of the protection order that the proceedings assume a criminal overtone.

16. A brief reference to the provisions of Section 28 of the Act would be necessary at this stage, which read as under :

***“28. Procedure** - (1) Save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973(2 of 1974).*

(2) Nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 or under sub-section (2) of Section 23.”

17. Thus, it can be seen that although as per subsection (1) of Section 28 of the Act, the provisions of Cr.P.C. are made applicable to the enquiry under Section 12 of the Act, subsection (2) of Section 28 of the Act declares that this will not be in derogation of the powers of the Magistrate to evolve his own procedure. A conjoint reading of subsections (1) and (2) of Section

28 of the Act would indicate that although the enquiry is to be governed by the provisions as contained in Cr.P.C., the Magistrate is allowed certain free play in devising his own procedure. It would be necessary to state that such a procedure cannot be in derogation of the basic principles of fair play. It would be pertinent to note that although Section 28(2) of the Act has diluted the rigour of strict procedure being applicable, the Court, in appropriate case, would be guided by the principles akin to the one contained in the evidence Act and any other procedural law as may be applicable, in devising its own procedure. The enabling provision and the discretion conferred under Section 28(2) of the Act has to be exercised cautiously and with great circumspection. It is trite that wider the discretion, greater would be the circumspection required. This is not to whittle down the discretion conferred on the Magistrate in any manner. It would depend on facts and circumstances of each case. The ultimate object of the enquiry being to find out truth as to the allegations of respondent, indulging into the acts of domestic violence vis-a-vis the petitioner. That is necessary condition on the basis of which the Magistrate gets jurisdiction to grant further reliefs.

18. Turning to the present case, the reply filed by the petitioner to the applications for summoning the two sons as

witnesses, as also the submissions on behalf of the petitioner would show that it is the material contention that the sons could not have been summoned, before the respondent himself enters into the witness box. This has been negatived both by the learned Magistrate and the learned Sessions Judge. In this regard, it would be necessary to make a reference to the provisions of Section 135 of the Indian Evidence Act which read as under :

“135. Order of production and examination of witnesses. - The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.”

19. Thus, the order, in which the witnesses are produced and examined, has to be regulated by the law and practice for the time being relating to Civil and Criminal Procedure respectively and in the absence of any such law, by the discretion of the Court. The impugned order can now be tested both on account of the proceedings being in the nature of civil proceedings and / or on the basis of Section 311 of Cr.P.C., under which the applications were purportedly filed by the respondent. So far as the civil proceedings are concerned, Order XVIII, Rule 3A which is relevant

for the purpose, reads as under :

“3-A. Party to appear before other witnesses. –

Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.”

20. Thus, it can be seen that where a party himself wishes to appear as witness, he shall so appear before any other witness on his behalf is examined, unless the Court for the reasons to be recorded, permits him to appear as his own witness at a later stage. The impugned orders do not show any consideration in this regard.

It would be significant to note that the respondent would also be equally material witness, in the matter, in refuting the allegations regarding indulgence into acts of domestic violence. During the course of arguments at the bar, it is not claimed that the respondent does not wish to examine himself. In that view of the matter, the absence of any consideration on principles akin to Order XVIII, Rule 3A (assuming that the proceedings are predominantly of civil nature), would be material.

21. This takes me to the provisions of Section 311 of Cr.P.C. As noticed earlier, the learned Magistrate has found that the proceedings are of civil nature and as such, it does not appear that the learned Magistrate has called into aid the provisions of Section 311 of Cr.P.C., being the source of power for passing the impugned order. Be that as it may, the scope and ambit of the powers of a Criminal Court under Section 311 of Cr.P.C. fell for consideration of the Hon'ble Apex Court in **Rajaram Prasad Yadav** (supra). After taking a survey of the various decisions holding the field, it has been *inter alia* held that the object underlying Section 311 of Cr.P.C. is that there may not be failure of justice on the ground of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses from either side. The determinative factor is whether it is essential to the just decision of the case. Such a power can be exercised at any stage of the enquiry or trial or other proceedings under the Cr.P.C. A caution has been sounded, inasmuch as the section confers very wide powers on the Court summoning the witnesses. The discretion conferred has to be exercised judiciously. As wider the power the greater is the necessity for application of judicial mind. (See **Iddar and Others Vs. Aabida and anr.**, AIR 2007 SC 3029). The Hon'ble Apex Court in the case of **Rajaram Yadav** (supra) has summarised the

principles, that will have to be borne in mind by the Court, while dealing with the application under Section 311 of Cr.P.C., in paragraph 16 of the judgment. It has been held that power under Section 311 of the Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice for strong reasons and the same must be exercised with care, caution and circumspection.

22. The net result is that it is open for the learned Magistrate to lay down his own procedure for disposal of an application under Section 12 or under sub-section 2 of Section 23 of the Act. However, the Magistrate, depending upon facts and circumstances of the case, would be guided by principles akin to or underlying the relevant provisions under the Evidence Act and other enactments, governing procedural aspects.

23. Turning to the present case and considering the overall circumstances and having regard to the fact that the proceedings are essentially of civil nature, I find that it would be appropriate that the Magistrate considers the application, after the respondent examines himself, if so advised.

24. In the result, the following order is passed :

- (i) The Revision Application is allowed.
- (ii) The Impugned order dated 05/02/2015 of the learned Sessions Judge and dated 07/10/2014 of the learned Magistrate are hereby set aside.
- (iii) It would be open for the respondent to press for the applications exhibits D-55 and D-56, after the respondent examines himself. In that case, the learned Magistrate shall pass appropriate orders, in accordance with law. It would also be open to the respondent, if he does not intend to examine himself, to put it on record, so that the Magistrate can consider the applications afresh.
- (iv) Parties to appear before the learned Magistrate on 30/04/2015.

25. The Revision Application is allowed in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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