

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T. SANKARAN

&

THE HONOURABLE MR. JUSTICE BABU MATHEW P. JOSEPH

TUESDAY, THE 10TH DAY OF MARCH 2015/19TH PHALGUNA, 1936

WA.No. 555 of 2015

AGAINST THE JUDGMENT IN OP(Crl.) 23/2015 ON THE FILES OF THE
HIGH COURT OF KERALA DATED 10-02-2015

APPELLANTS/RESPONDENTS 2 TO 5:

1. A.R. HASHIR
NAJIYA HOUSE, AZAD NAGAR 2, PALLIMUKKU
VADAKKEVILA VILLAGE, KOLLAM - 691 008.
2. RASEENA BEEVI
W/O. A.R. HASHIR, NAJIYA HOUSE, AZAD NAGAR 2
PALLIMUKKU, VADAKKEVILA VILLAGE, KOLLAM - 691 008.
3. NIYAS, S/O. A.R. HASHIR, NAJIYA HOUSE, AZAD NAGAR 2
PALLIMUKKU, VADAKKEVILA VILLAGE, KOLLAM - 691 008.
4. NOUFAN HASHIR
S/O. A.R. HASHIR, NAJIYA HOUSE, AZAD NAGAR 2
PALLIMUKKU, VADAKKEVILA VILLAGE, KOLLAM - 691 008.

BY ADVS. SRI.G.SREEKUMAR (SR.)
SRI. ANIL XAVIER
SRI.M.SHAHEED AHMAD
SRI.M.RISHIKESH SHENOY
SRI.E.V.BABYCHAN

RESPONDENTS/PETITIONER & RESPONDENTS 1 & 6:

1. SHIMA, AGED 29 YEARS
D/O. SAINUDEEN, CHARUVILAVEETIL, SILPA NAGAR 35
AYATHIL P.O., VADAKKEVILA VILLAGE, KOLLAM.
2. NAVAS (NAWAF), S/O. A.R. HASHIR,
NAJIYA HOUSE, AZAD NAGAR 2, PALLIMUKKU,
VADAKKEVILA VILLAGE, KOLLAM.
3. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.T.HABDUL AZEEZ

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 10-03-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K.T.SANKARAN &
BABU MATHEW P. JOSEPH, JJ.**

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Dated this the 10th day of March, 2015

JUDGMENT

K.T.Sankaran, J.

The question involved in this Writ Appeal is whether a residence order under Section 19 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Domestic Violence Act') can be granted in respect of a house owned by the mother-in-law of the applicant.

2. In **S.R.Batra and another v. Taruna Batra ((2007) 3 SCC 169)**, the Supreme Court held thus:

“29. As regards Section 17(1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and 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 property in question in the present case

neither belongs to Amit Batra nor was it taken on rent by him nor is it a joint family property of which the husband Amit Batra is a member. It is the exclusive property of appellant No.2, mother of Amit Batra. Hence it cannot be called a “shared household”.

3. In ***S.R.Batra's case***, the Supreme Court considered the contention put forward by the wife that the definition of 'shared household' includes a household where the person aggrieved lives or at any stage had lived in a domestic relationship, and held thus:

“24. Learned counsel for the respondent Smt. Taruna Batra stated that the definition of shared household includes a household where the person aggrieved lives *or at any stage had lived* in a domestic relationship. He contended that since admittedly the respondent had lived in the property in question in the past, hence the said property is her shared household.

25. We cannot agree with this submission.

26. If the aforesaid submission is accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife

may have lived together in dozens of places e.g. with the husband's father, husband's paternal grandparents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.”

4. The Supreme Court noticed in paragraph 30 of the judgment thus:

“30. No doubt, 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.”

5. In the present case, the learned Single Judge took the view that in the facts and circumstances of the case the decision in **S.R.Batra and another v. Taruna Batra ((2007) 3 SCC 169)** can be distinguished. The learned Single Judge held that if a woman along

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with her husband had stayed in a particular house either belonging to her mother-in-law or father-in-law, after her marriage, and if the marriage was arranged by the parents and the bride was brought to the matrimonial home with the blessings of the parents of the husband, the parents of the husband cannot subsequently turn against the woman and take a stand that it was not her shared household. It was held that if the bride was brought to the house by the in-laws, and the bride and bridegroom stayed in that house, it would constitute “an implied authority and a right to the girl to reside in that house by treating it as the shared household”. A distinction was made by the learned Single Judge where the bride was brought to the house of the parents of the husband without the junction of his parents, and held that in such cases the bride cannot put forward a claim that it was a shared household. A distinction was drawn by the learned Single Judge between an arranged marriage and the marriage which took place otherwise, while considering the question of shared household.

6. A similar view was taken by another learned Single Judge in **Prabhakaran v. State of Kerala (2009 (1) KLT 175)**.

7. The learned senior counsel appearing for the appellants submitted that the judgment impugned in this appeal goes against the view taken by the Supreme Court and, therefore, it is clearly unsustainable.

8. The learned counsel appearing for the respondents justified the view taken by the learned Single Judge and contended that a pragmatic view is to be taken in the matter as the Act was intended to protect women.

9. Before deciding the question involved in the case, it is necessary to briefly state the facts of the case. Shima (the first respondent) was married to Navas (Nawaf) (second respondent). Navas is the son of Hashir and Raseena Beevi, the appellants herein. The marriage took place on 22.08.2013. The husband is working abroad. It would appear that there arose difference of opinion between the husband and wife, namely, Shima and Navas (Nawaf). He also initiated proceedings for pronouncing 'talak'. On 29.12.2014, on the report filed by the Protection Officer at the

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instance of Shima, proceedings were initiated before the Court of the Judicial Magistrate of the First Class II, Kollam under Section 12 of the Domestic Violence Act. On 31.12.2014, the learned Magistrate passed Ext.P2 exparte order, the relevant portion of which reads as follows:

“Heard the counsel for the petitioner. Perused the affidavit in support of petition. The court is satisfied with a prima facie case. Hence the respondents are restrained from harassing the petitioner either mentally or physically until further orders. The first respondent is directed to pay ₹2500 as interim maintenance to the petitioner until further orders. Issue notice to respondents.”

10. On 9.1.2015, the learned Magistrate advanced the case on the application of Shima and passed Ext.P3 exparte order, the relevant portion of which reads as follows:

“Case advanced. Perused the affidavit in support of petition. Considering the grounds stated in the petition at this stage the respondents are restrained from obstructing the peaceful residence of the petitioner in the shared house hold until further orders. Issue notice to the respondents.”

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11. On 16.1.2015, appellant No.2 (the mother-in-law of Shima) filed an Original Petition (Criminal) under Article 227 of the Constitution of India challenging Exts.P2 and P3 orders on the ground that the house in respect of which the residence order was passed belongs to her and not to her son and that it is not at all a shared household. The Original Petition (Criminal) was not numbered as the Registry took the view that an Original Petition (Criminal) under Article 227 was not maintainable. Appellant No.2 (the mother-in-law of Shima) withdrew the Original Petition (Criminal) on 20.1.2015. The objection raised by the Registry was that Exts.P2 and P3 orders were appealable under Section 29 of the Domestic Violence Act.

12. On 24.1.2015, appellant No.2 (mother-in-law) filed Crl.A.No.16 of 2015 on the file of the Court of the Sessions Judge, Kollam challenging Ext.P3 residence order. On 28.1.2015, the Appellate Court granted a stay of Ext.P3 residence order.

13. Meanwhile on 16.1.2015, Shima, the wife, filed Ext.P5 petition before the Magistrate's Court to break open the lock of the

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house with police help in order to implement the residence order. On Ext.P5 application, the learned Magistrate passed Ext.P6 exparte order dated 16.1.2015, the operative portion of which reads as follows:

“Heard the counsel for the petitioner. Considering the grounds stated in the petition, Station House Officer concerned is directed to give necessary aid. Issue notice to the respondents since hearing the other is necessary.”

14. On 20.1.2015, Shima, the wife, filed O.P.(CrI) No.23 of 2015 (from which the Writ Appeal arises) against her husband, father-in-law, mother-in-law and brothers-in-law praying for the issue of a direction to the learned Magistrate to consider and pass appropriate orders on Ext.P5 petition in the light of the report filed by the Protection Officer and to issue a direction to the Station House Officer, Eravipuram Police Station to break open the lock of the shared household. The grievance put forward in O.P.(CrI) No.23 of 2015 was that though the learned Magistrate passed Ext.P6 order directing the police to provide necessary aid, no specific direction was issued to break open the lock of the door.

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15. On 21.1.2015, the learned Single Judge ordered notice to the respondents in the Original Petition by special messenger. On 27.1.2015, the learned Single Judge passed an interim order directing the Sub Inspector of Police, Eravipuram Police Station “to force open the house at the earliest, so as to have the petitioner and her aged parents an entry into the house”. A further direction was issued to report to the Court after executing the order.

16. On 28.1.2015, the interim order passed by the learned Single Judge was implemented and the lock of the house was broke open and the key was handed over to Shima, the wife. The learned senior counsel appearing for the appellants submitted that though on 27.1.2015 a day's time was prayed for by the appellants herein to file a counter affidavit, that request was not granted by the Court and on that day itself the interim order was passed.

17. On 30.1.2015, though the father-in-law, mother-in-law and brothers-in-law of Shima filed I.A.No.1424 of 2015 to recall the

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interim order dated 27.1.2015, it would appear that no order was passed on that application.

18. On 10.2.2015, the learned Single Judge passed the final judgment from which the Writ Appeal was filed by the father-in-law, mother-in-law and brothers-in-law of Shima.

19. The Registry raised an objection to the maintainability of the Writ Appeal on the ground that no appeal would lie against a judgment in an Original Petition (Criminal) under Article 227 of the Constitution of India. The learned Single Judge in the judgment impugned stated that the power under Article 226 of the Constitution of India was assumed in the case on hand, relying on the decision in **M/s.Pepsi Foods Ltd. v. Special Judicial Magistrate (AIR 1998 SC 128)** and the order was passed accordingly. We overruled the objection raised by the Registry, relying on the decision in **State Bank of India & another v. M/s.Kinship Services (India) Pvt. Ltd. & another (ILR 2013 (4) Kerala 381)**. When jurisdiction under Article 226 is exercised, undoubtedly a Writ Appeal would lie against that decision.

20. As mentioned earlier, in ***S.R.Batra's case***, the Supreme Court, in clear terms, held that a residence order cannot be passed to enforce residence of the wife in the house belonging to her mother-in-law. The Supreme Court also noticed that the definition of “shared household” was not happily worded and it was the result of a clumsy drafting. The Supreme Court held that an interpretation which is sensible and which would not lead to chaos in the society should be made. Before the enactment of the Domestic Violence Act, there was no concept of protection orders, residence orders and the like. Probably, the wife could enforce her civil rights through civil courts. A new right was created for the first time under the Domestic Violence Act and a new remedy was also provided. The Domestic Violence Act provides for several rights and the remedy is provided through criminal courts for expeditious implementation of the orders passed by the Court. Section 26 of the Act provides that any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a Civil Court, Family Court or a Criminal Court. Section 36 of the Act states that the provisions of the Act shall be in addition to, and not in derogation of the provisions

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of any other law, for the time being in force. Clauses (a), (f), (o) and (p) of Section 2 of the Domestic Violence Act define respectively, “aggrieved person”, “domestic relationship”, “protection order” and “residence order”. Section 2(s) defines the expression “shared household”, which reads as follows:

“2. Definitions.-- In this Act, unless the context otherwise requires,--

.....

- (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.”

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21. The ingredients to constitute the shared household are the following: (1) The person aggrieved lives or at any stage has lived in the shared household; (2) such residence was in the form of a domestic relationship; (3) such residence could be either singly or along with the respondent; (4) the household could be owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them; (5) the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity in respect of the shared household; and (6) the shared household 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.

22. Going by the plain words of the expression “shared household”, a residence belonging to the mother-in-law or father-in-law would not be a “shared household”. It was held so in ***S.R.Batra's case***.

23. It may be possible to take a more progressive view and

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expand the scope of “shared household” to include the house belonging to the father-in-law, mother-in-law, etc. But the Court has no jurisdiction to incorporate an item in the expression “shared household” which the Parliament did not think it fit to include. It is not for the Court to create an ideal situation which the society may desire to achieve, if the words of the Statute do not permit such an interpretation. It is for the law makers to make provision for such ideal situation, which the society may need. On the other hand, if two interpretations are possible, probably the Court may take a view which is conducive to the social welfare or women's welfare or to achieve gender justice, in the facts and circumstances of the situation. When the Supreme Court has laid down the principles based on the interpretation of the definition in the Statute, a High Court is not entitled to tinker with that interpretation and deviate from the dictum laid down by the Supreme Court. In **Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others** (AIR 1985 SC 330), the Supreme Court held thus:

“6. We desire to add and as was said in Cassel and Co. Ltd. v. Broome, 1972 AC 1027 we hope

it will never be necessary for us to say so again that in the hierarchical system of Courts which exists in our country, it is necessary for each lower tier, including the High Court, to accept loyally the decisions of the higher tiers. "It is inevitable in a hierarchical system of Courts that there are decisions of the Supreme Appellate tribunal which do not attract the unanimous approval of all members of the judiciary But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted". (See observations of Lord Hailsham and Lord Diplock in *Broome v. Cassell*.) The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system. It is needless to add that in India under Art.141 of the Constitution the law declared by the Supreme Court shall be binding on all courts within the territory of India and under Art.144 all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court."

24. For the aforesaid reasons, with respect, we do not agree with the conclusion arrived at by the learned Single Judge that the definition of "shared household" includes the house belonging to the mother-in-law of the person who claims a residence.

25. The maximum relief that was sought for in the Original Petition was to issue a direction to the learned Magistrate to consider and pass appropriate orders on Ext.P5 petition in the light of Ext.P4 report and to issue a direction to the Station House Officer, Eravipuram Police Station to break open the lock of the shared household. As regards the first prayer, even if the same is granted, the appellants would not have been aggrieved. However, the learned Single Judge thought it fit to grant the second prayer as an interim relief. A relief which could be granted at the final stage after hearing the parties and affording them an opportunity of being heard, could not normally be granted as an interim measure. The Supreme Court in **Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others** (AIR 1985 SC 330), cautioned against granting such interim orders in the following words:

“It is indeed a great pity and, we wish we did not have to say it but we are afraid we will be signally failing in our duty if we do not do so some courts, of late, appear to have developed an unwarranted tendency to grant interim orders with a great potential for public mischief for the mere asking. ...”

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26. It is to be noted that against Exts.P2 and P3 orders statutory appeals are maintainable under Section 29 of the Domestic Violence Act. [See **Sulochana v. Kuttappan (2007 (2) KLT 1)**, wherein it was held that an appeal under Section 29 of the Domestic Violence Act would be maintainable against an interim protection order, interim residence order, interim monetary order, interim custody order or an interim compensation order under Sections 18 to 22 of the Domestic Violence Act; and **Harshakumar and another v. State of Kerala and others (2011(3) KHC 15)**, wherein it was held that against a judgment of the Sessions Court in an appeal preferred under Section 29 of the Domestic Violence Act, a Revision would lie to the High Court under Section 397(1) read with Section 401 of the Code of Criminal Procedure.] The appellants filed CrI.A.No.16 of 2015 before the Sessions Court challenging Ext.P3 order and an interim order of stay was granted on 28.1.2015. The appeal was filed by the appellants before the Sessions Court on 24.1.2015. However, the appellants could not enjoy the benefit of stay granted by the Sessions Court since, in the mean time, on 27.1.2015, an interim order was passed by the learned Single Judge and it was

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implemented on 28.1.2015, the date on which interim stay was granted by the Sessions Court. Now a situation has arisen that even if the Sessions Court allows the Criminal Appeal filed by the appellants, it would be difficult to implement the order. It is also relevant to note that when the High Court has granted an interim order and which was confirmed in the final judgment, normally, the Sessions Court would not pass an order contrary to the same while dealing with Crl.A.No.16 of 2015.

27. It is the case of the husband that he had initiated proceedings for 'talak' and he had executed a 'talaknama' and it was communicated to his wife. That is disputed by the wife. The learned Single Judge held that whether she is a divorced wife or not, if there was a domestic relationship and the house was used as a shared household even for a moment, she is entitled to claim the right of residence in the shared household. We are of the view that this is an issue which is premature at this stage. There is dispute between the parties as to whether there was 'talak' or not. Since a disputed question of fact is to be decided, normally, it is not proper to decide such a question in a Writ Petition. The parties are free to put

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forward their respective contentions before the learned Magistrate in the proceedings pending before him.

28. After the arguments were over, it is heartening to note that both sides considered the suggestions put forward by the other side and agreed that the husband would pay a sum of ₹5,000/- per month as maintenance to the wife and that the husband would return the passport to the wife. It is submitted today that the passport of Shima was handed over to the learned counsel appearing for Shima in terms of the agreement. It was agreed that on such return of passport, the wife would voluntarily vacate the house in question without any objection. The learned counsel appearing for the wife submitted that since the passport has been returned, the wife would vacate the house within two days. The interim maintenance of ₹5,000/- per month would be paid by the husband to the wife till the culmination of the proceedings and the quantum of maintenance will be considered by the learned Magistrate at the time of final disposal of the case.

29. For the aforesaid reasons, we allow the Writ Appeal, set

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aside the judgment of the learned Single Judge and dismiss the Original Petition. Since we allowed the Writ Appeal and set aside the judgment impugned, it goes without saying that the residence order also would stand set aside and consequently, CrI.A.No.16 of 2015 filed by the mother-in-law before the Sessions Court would stand dismissed as infructuous.

(K.T.SANKARAN)
Judge

Babu Mathew P.Joseph, J.

I agree with the findings entered and the conclusions arrived at by my learned brother, K.T.Sankaran, J. But, I am unable to agree with the observation made by His Lordship that “it may be possible to take a more progressive view and expand the scope of “shared household” to include the house belonging to the father-in-law, mother-in-law etc.” This, in fact, prompted me to add this short paragraph. Section 2(s) of the Protection of Women from Domestic Violence Act, 2005, defines “shared household”. Interpreting the scope of this provision, the Honourable Supreme Court laid down in **S.R.Batra's case** (supra) that the property exclusively belonging to

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the mother-in-law cannot be called a “shared household”. Article 300 A still remains in our Constitution. Right to property, therefore, is a constitutionally guaranteed right. Such a right cannot be taken away by giving an interpretation expanding the scope of “shared household” by including the house or building belonging to the father-in-law, mother-in-law etc. Therefore, it is my considered opinion that a view contrary to the same cannot be a progressive one.

(BABU MATHEW P. JOSEPH)
Judge

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