

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

MONDAY, THE 5TH DAY OF JANUARY 2015/15TH POUSHA, 1936

WP(C).No. 26559 of 2008 (J)

PETITIONER(S):

**RADHA, W/O.SHANMUGHAN, KALAVARAKUNNU
PARAMBAN, VELUPPADAM DESOM, VARANTHARAPPILLY
MUKUNDAPURAM.**

BY ADV. SRI.MANSOOR.B.H.

RESPONDENT(S):

- 1. DEPUTY TAHSILDAR (RR) MUKUNDAPURAM,
THRISSUR DIST.**
- 2. TAHSILDAR, TALUK OFFICE, MUKUNDAPURAM.**
- 3. STATE OF KERALA, REP. BY ITS SECRETARY
TAXES DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.**

R, BY GOVERNMENT PLEADER SMT.LILLY.K.T.

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
17-12-2014, THE COURT ON 5.1.2015 DELIVERED THE FOLLOWING:**

W.P.(C).NO.26559/2008

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE FINAL REPORT FILED BY THE POLICE.

EXT.P2: COPY OF THE NOTICE DATED 2.8.2008 BY THE 2ND RESPONDENT.

EXT.P3: COPY OF THE REPORT IN FLASH DAILY DATED 7.6.2008.

RESPONDENTS EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

'C.R.'

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C).NO.26559 OF 2008 (J)

Dated this the 5th day of January, 2015

J U D G M E N T

The petitioner in the writ petition is a lady, belonging to a scheduled caste, and living with her two daughters in a house situated on three cents of land in Sy.No.918/7/1 of Varantharappally Village in Mukundapuram Taluk. In the writ petition she impugns Ext.P2 notice, served on her under the Revenue Recovery Act, proposing a sale of the property for realisation of dues, amounting to Rs.2,84,23,722/- together with interest and collection charges thereon, owing to the Sales Tax department from her husband Sri. P.V.Shanmugham. The property, that is sought to be proceeded against, belongs to her husband, who has been missing since 22.11.2006. While the petitioner had brought this fact to the notice of the police authorities immediately, and has been pursuing the complaint ever since, the investigation done by the police authorities did not yield any result. This prompted the petitioner to approach this Court through W.P.(C). No.24057/2008 seeking an entrustment of the investigation to the Crime Branch or the CBCID. The said writ petition was disposed by

judgment dated 19.11.2008, directing the Director General of Police to entrust the investigation of the petitioner's case with the Crime Branch or CBCID and to see that effective steps are taken to find out the missing husband of the petitioner. It is the case of the petitioner that despite the said direction of this Court, the police authorities have not been able to trace out her husband till date. It has now been over eight years since the husband of the petitioner was reported missing and the present notice, proposing a sale of the property where she is staying with her two daughters, dangles over her head like a Damocles' sword, ready to deprive her of her matrimonial home. By virtue of an interim order dated 03.09.2008 of this Court, she has been insulated from a forceful eviction till now. In the writ petition, she impugns Ext.P2 notice on grounds that are not seen traced to any legal right but are more in the nature of a plea for mercy.

2. A counter affidavit has been filed on behalf of the respondents wherein the details of the dues, owing to the Sales Tax department from her husband, are enumerated. The Revenue Recovery proceedings are sought to be justified on the contention that the property, against which the proceedings are initiated, is the only

property that exists in the name of the defaulter and hence it must be brought to sale if the State is to recover at least part of its dues.

3. I have heard Sri. Mansoor, the learned counsel for the petitioner and Smt. Lilly K.T, the learned Government Pleader for the respondents.

4. On a consideration of the facts and circumstances of the case, and the submissions made across the bar, I note that this is a case that throws up a very pertinent issue regarding the right, if any, of a deserted wife, to resist a proposed sale of her matrimonial home, in proceedings initiated under the Kerala Revenue Recovery Act at the instance of creditors of her husband. The proceedings in the instant case are for realisation of sales tax arrears due from her husband, and her matrimonial home is the only item of immovable property that her husband owns and is, therefore, available to be proceeded against under the Revenue Recovery Act. While under normal circumstances, a person in permissive occupation of the property would not be entitled to deny the rights of a creditor whose claims are secured by the property in question, a deserted wife, in my opinion, stands on a different footing. It would be worth recalling that the common law in

England did, for a time, recognise a right in the deserted wife to remain in the matrimonial home, which right was enforceable against all successors to the property, save purchasers for value without notice. The said right was subsequently held to be not a proprietary right, that could be enforced against others, but merely a personal right that could be enforced against her husband **(See: National Provincial Bank Limited v. Ainsworth - 1965 (2) All.ER 472 (HL))**. In India, however, where the social circumstances are different and there are a large number of women, especially in the lower economic strata of society, who look to their husbands to provide them with a roof over their heads and economic security in general, a different approach is warranted.

5. It is necessary, at this juncture, to consider the nature of occupancy that a wife has in her matrimonial home. Obviously she is a person in possession of the property. She holds such possession by virtue of the authority given to her by her husband who is the owner of the property. The husband gives her such authority pursuant to an obligation that stems from their marriage. It is an obligation to look after and take care of her during the tenure of their relationship as husband and wife. The issue, however, is whether the said obligation

is in the nature of a mere moral obligation or whether it assumes the nature of a legal obligation. If it is the latter, then the wife can claim rights or interests in the matrimonial home that stem from the legal obligation owing to her from her husband. I am of the view that in the case of a deserted wife, the obligation of a husband metamorphoses from a mere moral obligation into a legal obligation. The said legal obligation has also received statutory recognition in the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the '2005 Act') which provides for rights of residence to deserted wives.

6. It would be apposite, at this juncture, to notice some of the provisions of the 2005 Act.

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

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(f) “domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

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(q) “respondent” means any adult male person

who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act.

3. Definition of domestic violence:- For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

- (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
- (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (1) or clause (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.- For the purposes of this section,-

(i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) “verbal and emotional abuse” includes-

- (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and
 - (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.
- (iv) “economic abuse” includes-
- (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
 - (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
 - (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.- For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence” under this section, the overall facts and circumstances of the case shall be taken into consideration.

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17. Right to reside in a shared household:- (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she had any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

7. The situation of the petitioner, whose husband has been missing since 2006, is not very different from that of a deserted wife. The trauma that she has had to endure all these years, in trying to find financial resources to sustain herself and her two daughters, would have sufficed for any deserted wife to maintain a complaint against her husband, alleging domestic violence, inter alia, under the heads of emotional and economic abuse. In that event, such a person would have been entitled to the protection offered by Section 17 of the 2005 Act, viz. the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same, and notwithstanding anything contained in any other law for the time being in force. Should such a protection available to a deserted wife, be denied to the petitioner solely on the ground that, in her case,

there is no proof of actual desertion since her husband cannot be found ? In my view, the answer to this question must be an emphatic and resounding “NO”. The rights available to a deserted wife under the 2005 Act must surely be available to the petitioner whose husband has been missing since 2006, and in whose search, the police authorities have been engaged in for the past eight years. Although the petitioner may not, strictly speaking, have the locus standi to maintain a complaint under the 2005 Act, principles of equity and fairness can certainly be taken into consideration while dispensing justice in any particular case. As Lord Cowper observed in **Lord Dudley v. Lady Dudley – (1705) Prec.Ch. 241:**

“Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted rights are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.”

8. A similar distinction between the concepts of niti and nyaya,

both of which stand for justice in classical Sanskrit, has long been recognised in Indian jurisprudence. In his book “The Idea of Justice”, Nobel Laureate Amartya Sen observes:

“Among the principal uses of the term *niti* are organizational propriety and behavioral correctness. In contrast with *niti*, the term *nyaya* stands for a comprehensive concept of realized justice. In that line of vision, the roles of institutions, rules and organisation, important as they are, have to be assessed in the broader and more inclusive perspective of *nyaya*, which is inescapably linked with the world that actually emerges, not just the institutions or rules we happen to have”

9. In my view, looking at the facts of the instant case, the interests of justice would require me to hold that the authorities under the Kerala Revenue Recovery Act could not have proceeded to issue Ext.P2 notice proposing a sale of the matrimonial home of the petitioner without taking note of the right available to the petitioner under the 2005 Act, to reside in the said home without being evicted or excluded from it. This is especially so because, in terms of Section 60 of the Kerala Revenue Recovery Act, the sale that is contemplated is one of immovable property that is free of all encumbrances and such a sale cannot be effected in the instant case because the right available to the petitioner, in terms of Section 17 of the 2005 Act, and the non-obstante clause therein would be an encumbrance on the

property that overrides the provisions of the Kerala Revenue Recovery Act.

10. There is yet another aspect of the matter. Article 21 of the Constitution of India guarantees that no person shall be deprived of his life or personal liberty except according to procedure established by law. Judicial interpretation of Article 21 of the Constitution has seen its scope being widened to take within its embrace a right to live with human dignity. In **Chameli Singh v. State of UP – [(1996) 2 SCC 549]**, the right was held to include a right to food, water, decent environment, education, medical care and shelter. It was clarified that the right to shelter did not mean a mere right to a roof over one's head. It is also relevant to note that the right is a fundamental one that is guaranteed by the State and hence the State Government cannot take any action that will deprive a person of the enjoyment of the rights guaranteed under Article 21 of the Constitution. Viewed in the backdrop of the constitutional guarantee, therefore, the State Government cannot be "Shylockean" in its functioning, and seek to dispossess a deserted wife from her matrimonial home, especially when the right to reside in the said home, without being evicted therefrom, is a statutory protection afforded to her under the 2005

Act. The action proposed through Ext.P2 notice would, therefore, fall foul of the constitutional guarantee offered to the petitioner under Article 21 of the Constitution of India.

Thus, I am of the view that any action that is proposed by the respondents, for sale of the property described in Ext.P2 notice, must necessarily take into account the rights of the petitioner in respect of the said property. The said aspect not having engaged the attention of the respondents in the instant case, Ext.P2 notice cannot be legally sustained. Resultantly, I quash Ext.P2 notice and declare that proceedings for sale of the property described in Ext.P2 notice, at a time when the petitioner's husband's whereabouts are not known, cannot be continued under the Kerala Revenue Recovery Act, without first ensuring that the petitioner's rights under the 2005 Act are adequately safeguarded. The writ petition is thus allowed as above, but without any order as to costs.

A.K.JAYASANKARAN NAMBIAR
JUDGE

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