

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.50 OF 2017

KAVIRAJ DATTATRAY MUSLONKAR)...APPLICANT

V/s.

RACHANA KAVIRAJ MUSLONKAR & ANR.)...RESPONDENTS

Mr.Arjun Kode, Advocate for the Applicant.

Mr.H.V.Kenjalkar, Advocate for Respondent No.1.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 19th APRIL 2017

P.C. :

1 By this revision petition, the revision petitioner / original respondent / husband is challenging the judgment and order passed in an appeal under Section 29 of the Protection of Women from Domestic Violence Act, 2005 (for the sake of brevity D.V.Act) filed by the respondent herein / original applicant / an

aggrieved person challenging the order passed by the learned Metropolitan Magistrate on 26th August 2016, rejecting her application for interim relief filed in C.C.No.51/DV/2015.

2 Facts necessary for deciding the revision petition are thus:

The respondent herein / an aggrieved person filed an application under Section 12 of the D.V.Act and along with that application she filed an application for interim relief praying for several reliefs by invoking various provisions of the D.V.Act. Out of those reliefs, relief of maintenance for her daughter and interim relief for house rent constitutes the subject matter of this revision petition. The application for interim relief filed in proceedings under the D.V.Act by the respondent herein / an aggrieved person came to be opposed by filing reply by the revision petitioner / husband. After hearing the parties, ultimately, by an order dated 26th August 2016 the learned Metropolitan Magistrate, Mumbai, was pleased to hold that the application does not *prima facie* disclose domestic violence committed by the revision petitioner /

husband on the respondent herein / an aggrieved person. It is observed by the learned Metropolitan Magistrate that it is quite unnatural that the aggrieved person did not file a FIR in the matter and the ill-treatment appears to be of the sort of usual wear and tear of the matrimonial relations between the parties. It is further observed by the learned trial Magistrate that the aggrieved person before her is doing a job. With such observations, the application for interim relief came to be rejected. The said order was carried in appeal by the aggrieved person by invoking provisions of Section 29 of the D.V.Act. Her appeal came to be allowed partly by the impugned judgment and order dated 30th November 2016 passed by the learned Additional Sessions Judge, Mumbai. By the impugned judgment and order passed in Criminal Appeal No.725 of 2016 the learned Additional Sessions Judge had set aside the impugned order and directed the revision petitioner herein / husband to pay Rs.10,000/- towards maintenance of daughter of the couple as well as an amount of Rs.10,000/- towards monthly rent from the date of filing of the proceedings under the D.V.Act.

3 I have heard the learned advocate appearing for the revision petitioner / husband at sufficient length. He drew my attention to the fact that after 2011 matrimonial life of the couple started facing rough weather. He argued that on 21st April 2011 first N.C. was lodged against the revision petitioner / husband in respect of the incident dated 12th April 2011 with Nehru Nagar Police Station alleging abuse and assault by hand. He further argued that then on 11th September 2013 another N.C. came to be lodged on the basis of hearsay information received from his another daughter by father of the aggrieved person. Then, according to the learned advocate appearing for the revision petitioner / husband, in a systematic manner the aggrieved person made complaints to the Senior Police Inspector reflecting her averments that because of conduct of the revision petitioner / husband she is not willing to cohabit with him and her daughter is frightened of her husband and therefore she has decided to take divorce. Two such reports were pressed in service. With this, it is argued that it was the aggrieved person who systematically created evidence and left company of the husband. She was not

driven out of the house by the revision petitioner / husband. My attention is further drawn to the appointment order dated 8th September 2015 issued by the employer of the aggrieved person reflecting her pay package of Rs.15 Lakh per annum apart from perks and it was argued that this order came on record only when an application was filed by the husband for issuing summons to the employer of the aggrieved person. With this, the learned advocate prayed for quashing and setting aside the impugned judgment and order. At the same time, on instructions, the learned advocate appearing for the revision petitioner / husband stated that the revision petitioner / husband is willing to pay an amount of Rs.10,000/- towards maintenance of his daughter, who is in custody of the respondent herein / an aggrieved person.

4 As against this, the learned advocate appearing for the respondent herein / an aggrieved person drew my attention to various NCs as well as documents of medical treatment taken by the aggrieved person showing that because of assault by the revision petitioner / husband, the respondent / an aggrieved

person suffered injuries. My attention was drawn to the report of Samadhan Diagnostic Center as well as Discharge card issued by Jeevak Hospital to demonstrate that the aggrieved person had suffered hairline fracture on the mandibular angle of the left side. It is argued that the aggrieved person had suffered surgical operation because of assault on her by the revision petitioner / husband and this constitutes domestic violence and therefore the impugned judgment and order passed by the appellate court is correct. The learned advocate further argued that perverse view was adopted by the learned trial Magistrate in holding that for establishing domestic violence lodging of the report is a *sine-qua-non*.

5 I have carefully considered the rival submissions and also perused the record made available including the copy interim application as well as reply filed thereto, documents placed on record as well as the order passed by the learned trial Magistrate and the appellate order.

6 D.V.Act is a welfare legislation and it is upholding the dignity of women in the era of gender equality. It recognizes the rights granted in Articles 14, 15 and 21 of the Constitution of India. In the case in hand, the aggrieved person has preferred an application under Section 12 of the said Act accompanied with an application for interim relief. Perusal of the said application shows detail pleadings made by the aggrieved person in order to substantiate her claim for interim reliefs. This application came to be replied by the revision petitioner / husband by contending that he is an unemployed person and he has been rendered jobless since last seven months and is living basically on his scarce savings. The revision petitioner / husband has narrated his expenses and contended that it will be convenient if the aggrieved person resides in the same flat with their daughter putting restrictions on him.

7 Undisputedly, the appointment order of the aggrieved person reflecting her pay package was also a part of the record of the learned trial Magistrate.

8 At this stage, it is apposite to take note of some provisions in the D.V.Act. The term “Domestic Violence” is defined in Section 3 of the said Act and relevant portion of the said definition reads thus :

“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 (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.”

Section 23 of the said Act deals with powers of the court to grant interim and *ex parte* orders. The same reads thus :

“23. Power to grant interim and ex parte orders -

(1) **In** any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.”

9 Perusal of provisions of Section 23 as such goes to show that if the trial Magistrate is satisfied that the application *prima facie* discloses that the respondent is committing or has committed any act of domestic violence, then he may grant an *ex parte* order in the matter, on the basis of affidavit of the parties.

It is, thus, clear that commission of an act of domestic violence is necessary for granting relief and even likelihood of such commission entitles the aggrieved person for relief under the said Act. Section 20 of this Act deals with monetary reliefs which includes maintenance to an aggrieved person as well as her children.

10 In the case in hand, the learned trial Magistrate concluded that the aggrieved person is not entitled to interim relief because she has not *prima facie* proved commission of domestic violence to her by the respondent / husband. The another consideration was she is in employment.

11 In the statutory appeal filed by the aggrieved person, all these aspects are required to be reconsidered by the learned appellate court which is required to undertake exercise of appreciation of pleading and other material on record to record correct finding of fact. Bare perusal of the impugned judgment and order of the appellate court goes to show how these aspects

were considered by the learned appellate court. To hold that domestic violence is *prima facie* proved, findings of the learned appellate court can be found in the following portion of paragraph 17 of the impugned judgment and order :

“17.
Prima facie the grievance is that all the acts about the behaviour of respondent no.1 in particular manner attracts the provisions of the said Act. So, considering the definition of The Protection of Women From Domestic Violence Act, 2005, I hold that prima facie it attracts the said provision. So far as the grievance raised by respondent no.1, regarding absence of proof is concerned, it can be taken care of while considering the application on merits. So though the Ld. Lower Court has held that there was no incident of domestic violence act, one cannot easily accept the same. So, I did not agree with the said conclusion drawn by the Ld. Lower Court.”

12 It is also interesting to note how the learned appellate court, which is a fact finding court, has concluded about the maintenance of the daughter so also the quantum of monetary

rent. For this purpose, relevant portion of paragraph 18 and paragraph 19 needs reproduction :

“18..... But prima facie it shows that both are earning in the field of advertisement but by considering the expenses of Rs.82,000/- per month of respondent no.1, Ld.Advocate Mr.Kenjalkar has frankly submitted to grant Rs.10,000/- for maintenance of daughter and Rs.20,000/- for rent. But, Ld. Advocate Mr.Kode has submitted that respondent no.1 is ready to pay Rs.12,000/- per month in toto.”

“19. So far as the claim of maintenance is concerned, at this stage it is restricted only to the daughter and considering her age of six years, I hold it proper to accept the submissions advanced by Ld. Advocate Mr.Kode to ask respondent no.1 to pay Rs.10,000/- towards the maintenance of the daughter but regarding the claim of the shelter is concerned, it is the case of the appellant that she required to pay Rs.30,000/- per month towards the rent. Moreover, she required to pay deposit of Rs.1.50 lacs, but, considering the dispute between the parties and when they are well aware about the difficulty which they required to face in the absence

of backing of each other, it is expected from them that they should curtail their expenses. So, keeping in mind the same and considering the income of both the sides, I hold that though Ld. Advocate Mr.Kode has agreed to pay Rs.12,000/- towards the maintenance and rent but that would be very less amount. In spite of that it would be proper to grant Rs.10,000/- for the same i.e. to consider the amount of Rs.10,000/- per month towards the maintenance of the daughter and Rs.10,000/- per month towards the rent to appellant and her daughter till disposal of the original proceedings.”

13 Perusal of the entire judgment and order of the appellate court goes to show that it has not touched the pleadings of parties and other material on record. The same is not referred to in the impugned judgment and order nor the same is evaluated in order to record finding of fact in respect of proof of the domestic violence and entitlement, if any, and quantum of maintenance for the daughter and monthly rent. What was done is recording submission of learned advocates of both parties and concluding its finding on the basis of surmises and conjunctures,

rather than basing finding on material available on the record. From perusal of observations and findings recorded by the learned appellate court it is clear that the learned appellate court has not cared to look into the pleadings and documentary evidence adduced by the parties while deciding the statutory appeal, by which rejection of an application for interim relief under the D.V.Act came to be challenged by the aggrieved person. It is seen that a short cut method came to be adopted by the learned appellate court in disposing the statutory appeal wherein the claim was supported by detailed pleadings and voluminous documents and opposed by affidavit in reply as well as documents showing employment of the aggrieved person. It is, thus, clear that, the impugned judgment and order is totally perverse and therefore, cannot be sustained. Hence, the order :

- i) The revision petition is allowed.
- ii) The impugned judgment and order passed by the learned Additional Sessions Judge, Mumbai, on 30th November 2016 in Criminal Appeal No.725 of 2016 between the parties is quashed and set aside.

iii)The Criminal Appeal bearing No.725 of 2016 is remanded for deciding it afresh, to the Sessions court, Mumbai, with a direction that the same be decided within a period of two months from the date of communication of this order.

(A. M. BADAR, J.)