

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.4649 OF 2015

Sandip Mrinmoy Chakraboarty ...Petitioner

V/s.

Reshita Sandip Chakrabarty & Anr. ...Respondents

Mr. Abhijit Dilip Sarwate for the Petitioner.

Mr. Sanjay Bhojwani a/w. Ajinkya Udane for Respondent Nos.1 & 2.

Mr. K.V. Saste, APP for Respondent State.

CORAM : SMT.BHARATI H. DANGRE, J.

DATE : 06th SEPTEMBER 2018

ORAL JUDGMENT:

Rule. Rule returnable forthwith. Heard by consent.

1. The present Writ Petition is filed by the Petitioner, thereby seeking transfer of the proceedings pending on the file of the learned Judicial Magistrate First Class at Cantonment Court, Pune to the Family Court at Pune.

2. The Petitioner who is the husband seeks transfer of the proceedings, which have been filed by the wife. The respondent wife had instituted a petition before the Family Court seeking dissolution of the marriage and the said petition was instituted on 16.12.2013 and

came to be numbered as P.A.No.1386/2013. Apart from the relief of dissolution of marriage under the provisions of the Special Marriage Act, 1954, the respondent wife also sought certain ancillary reliefs in the form of grant of permanent physical custody of the minor son and also alimony pendente lite @Rs.75,000/- per month under the provisions of the Special Marriage Act. A relief was also sought to grant permanent alimony and maintenance to the tune of Rs.2,00,00,000/- to be paid by Respondent No.1 under the provisions of the Special Marriage Act. A prayer was also made for grant of interim maintenance and also the damages to be paid.

3. The specific case of the petitioner is that he filed a written statement-cum-counter-claim in the said P.A.No.1386/2013 before the Family Court and also sought dissolution of marriage and the custody of the minor son. Another proceeding which is instituted by the wife is in the form of the proceeding under the Protection of Women from Domestic Violence Act, 2005 (Domestic Violence Act) and an application under Section 12 of the Domestic Violence Act was filed before the learned Judicial Magistrate First Class at Cantonment Court, Pune on 11.02.2014. It is to be noted that in the said proceeding, the parents of the petitioner are also impleaded as party respondents and the major reliefs claimed in the said application reads thus:-

(i) This Hon'ble Court may be pleased to take cognizance of the

present application under the provisions of the Protection of Women from Domestic Violence Act.

(ii) This Hon'ble Court may be pleased to direct the Respondents not to indulge in any act of omission or commission that may cause any kind of Domestic Violence to the Applicants.

(iii) This Hon'ble Court may be pleased to restrain the Respondents or any one claiming through them from disturbing the physical custody of Applicant No.2 with Applicant No.1.

(iv) This Hon'ble Court may be pleased to restrain the Respondent No.1 from alienating, encumbering, in any manner or creating a third party interest in the flat jointly owned by the Applicant No.1 and the Respondent No.1 being Flat No.F-601 Maestros, S.No.60/7 Wanowrie, Pune – 411 040.

(v) This Hon'ble Court may be pleased to restrain the Respondents from dis-housing the Applicants from the flat wherein the Applicants are currently residing being Flat No.F-601 Maestros, S.No.60/7 Wanowrie, Pune – 411 040.

(vi) This Hon'ble Court may be pleased to restrain the Respondents from entering into the flat wherein the Applicants are currently staying being Flat No.F-601 Maestros, S.No.60/7 Wanowrie, Pune – 411 040.

(vii) This Hon'ble Court may be pleased to restrain the Respondents from making any contact with the Applicants in any manner whatsoever whether physically, telephonically, electronically or otherwise.

(viii) This Hon'ble Court may be pleased to direct the Respondent No.1 to pay the Applicant No.1 an amount of Rs.75,000/- p.m. as maintenance for herself, an amount of Rs.25,000/- p.m. as maintenance for the Applicant No.2.

(xii) This Hon'ble Court may be pleased to restrain the Respondent No.1 from alienating, encumbering, creating any third party interest or disposing of his movable and immovable properties till the final disposal of the present application.

4. The grievance raised by the petitioner before this Court is that the reliefs sought in two different proceedings is substantially the same and the issues that would arise for consideration are identical and the evidence to be laid and the defenses to be raised are also identical. He has, therefore, preferred an application u/s.24 of the Code of Civil Procedure to transfer the proceedings to the Family Court at Pune, which according to the petitioner has a wider jurisdiction and it would encompass the proceedings filed before the learned Judicial Magistrate First Class under the Domestic Violence Act, 2005.

5. The learned counsel for the petitioner Mr. Abhijit Sarwate would submit that the Family Courts Act, 1984 would permit the Family Court to exercise its jurisdiction over the proceedings under the Domestic Violence Act and specifically he would make his submission in the light of Section 26 of the Domestic Violence Act. The learned counsel would submit that the Family Courts Act, 1984 contains a provision in form of Section 20 which gives the provision of the Enactment an overriding effect over any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. It is his specific submission that the purpose of Section 26 of the Domestic Violence Act, 2005 is to ensure that any relief available under Sections 18, 19, 20, 21 and 22 can be sought in any legal proceeding, before a civil Court, family Court or a criminal Court,

whether such proceedings were initiated before or after commencement of this Act. He would invite the attention of this Court to the provisions of Family Courts Act, 1984 and would submit that the jurisdiction vested in the Family Court is wide enough to consider all the reliefs that have been prayed in the application specifically preferred under Section 12 of the Domestic Violence Act, 2005.

6. The learned counsel would place reliance on a judgment of the Single Bench of this Court (Coram : Shri. R.D. Dhanuka, J) in the case of *“Minoti Subhash Anand Vs. Subhash Manoharlal Anand”* decided on 10th December 2015 and he seeks to rely on the conclusion derived by the learned Single Judge in a similar situation when an application was filed invoking Section 24 of the Code of Civil Procedure, 1908 along with Article 227 of the Constitution of India and he would submit that in the peculiar circumstances and considering the powers of the Family Court to decide the proceedings which were pending, the said application came to be allowed and the Family Court was directed to proceed with the matter and the proceedings were expedited. He would also place reliance on another judgment delivered by the learned Single Judge on 04.08.2015 in case of *Amreen Akhoun Vs. Aditya Arun Poudval*, which determined the scope of Section 26 of the Domestic Violence Act, 2005 and as to in what circumstances the Family Court is competent to grant such relief.

7. Per contra, the learned counsel for the respondent Advocate Shri. Bhojwani would submit that the proceedings which have been filed before the learned Judicial Magistrate First Class, Pune have already advanced and the evidence in this proceeding has already commenced. He would submit that the proceedings which are instituted before the Family Court are at the stage of cross examination of the wife whereas in the Domestic Violence proceedings, the cross examination is already over. He would submit that at this stage the transfer of the proceedings would cause inconvenience to the parties. The learned counsel would specifically makes a reference to Section 23 of the Domestic Violence Act and would submit that Section 23 confers a power on the Magistrate to grant interim and ex parte orders. He would submit that the powers conferred on the Magistrate under the Domestic Violence Act, 2005 is a special power to grant interim and ex parte orders, as he deems fit and as per Advocate Shri. Bhojwani, the Family Court is not empowered to exercise a similar power while entertaining the proceedings before it, by virtue of Section 26 of the Domestic Violence Act, 2005. He would invite attention of this Court to the reliefs which are sought in the application and he would submit that the reliefs are distinct in nature and in the proceedings which are instituted before the Family Court a decree of divorce has been sought and in support of the said grounds, Respondent No.2 is also impleaded

as party respondents. He would submit that in the proceeding before the Magistrate, the application has been preferred under Section 12 seeking multiple reliefs and he would submit that the relief sought in prayer clauses 4, 5 and 6 in respect of the order of residence and Restraining orders against the respondent from alienating, encumbering and/or creating a third party interest in the flat jointly owned by the Petitioner No.1 and the Respondent No.1 being Flat No.F-601 Maestros, S.No.60/7 Wanowrie, Pune – 411 040. He would submit that the learned Magistrate is empowered to grant reliefs in the light of the powers conferred on him by virtue of Section 23 of the Domestic Violence Act, 2005. He would submit that the application, which is filed by the present petitioner seeking transfer of the proceedings is completely misconceived and beyond the scope and jurisdiction of the Family Court and therefore the present writ petition deserves to be dismissed.

8. I have carefully perused the copy of the petition and also the proceedings, which are instituted before the Family Court and also the application preferred under Section 12 of the Domestic Violence Act, 2005 before the learned Judicial Magistrate First Class, Pune. A perusal of the both applications would reveal that there is overlapping of certain reliefs. The relief which is sought in the petition before the Family Court is for dissolution of marriage alongwith the other reliefs

and the reliefs which are sought under the Domestic Violence Act, 2005 are overlapping some of the reliefs claimed before the Family Court. The reliefs as regards the residence order or restrain orders in respect of the residential house i.e. Flat No.F-601 Maestros, S.No.60/7 Maestros, S.No.60/7 Wanowrie, Pune – 411 040 where the petitioner wife is residing is distinct and that is not sought in the proceeding before the Family Court. The important question is whether the relief which is sought in Domestic Violence application before learned Magistrate can be granted by Family Court and whether it has the jurisdiction to grant such a relief. In order to answer the question, it would be apt to refer to provision of the two Enactment in brief.

9. The Family Courts Act, 1984 is an Enactment to provide for establishment of the Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. The said Enactment was brought into force in the backdrop of the 59th report of the Law Commission, which states that in dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts for its settlement before the commencement of the trial.

Perusal of Act would reveal that Section 7 sets out the jurisdiction

of the Family Court and provides that subject to the other provisions of the Act, a Family Court shall have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation and be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends. The explanation to the said section enumerates the nature of suits and proceedings and a series of the proceedings have been included, in respect of which the Family Court will exercise its jurisdiction. Sub-section 2 of Section 7 provides that the Family Court shall exercise jurisdiction which is exercisable by a Magistrate of the First Class under Chapter IX and also other jurisdiction conferred on it by any other Enactment. Sub-section (2) reads thus...

“(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise -

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.”

10. By virtue of sub-section (2) of Section 7, a Family Court is competent to exercise its jurisdiction which is exercisable by a

Magistrate of the First Class under Chapter IX (relating to order of maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and it is also competent to exercise such other jurisdiction as may be conferred on it by any other Enactment. Perusal of sub-section 2(b) would thus reveal that when this Enactment was brought into force, it carved out the jurisdiction of the Family Court in the existing situation by referring to the suits and proceedings which would be subjected to the jurisdiction of the Family Court and covered the proceedings before the learned Magistrate First Class. However apart from nature of the suits and proceedings, the legislature also introduced Clause (b) to sub-section (2) and it kept open the scope for the jurisdiction to be exercised by the Family Court if it is conferred by any other Enactment.

Section 8 was introduced in the Enactment for exclusion of jurisdiction in respect of the pending proceedings where a Family Court has been established for any area so as to confer jurisdiction on the Family Court. Perusal of the Enactment would further reveal that Section 20 gives an overriding effect to the provisions of the Act and it states that the provisions of the Family Courts Act, 1984 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Now provisions of the Domestic Violence Act, 2005 needs a brief mention. The Protection of Women from Domestic Violence Act, 2005 is an enactment to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the Family and for matters connected therewith or incidental thereto. The said Enactment in the definition part define and assign definite meaning to certain terms which it intends to apply. The term aggrieved person is defined in Section 2(a) to mean a women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Such a woman can approach the Magistrate by preferring an application under Section 12 of the Enactment. An aggrieved person or protection officer or other person on behalf of the aggrieved person is competent person for seeking one or more reliefs under this Act. What are the reliefs that may be claimed and which learned Magistrate may grant are then set out in Chapter IV and in specific from Section 17 to Section 22 of the said Enactment. In the sequence of these Sections, Section 23 finds a place. The said Section confers power on the Magistrate to pass interim order as he may deems fit, just and proper on the basis of affidavit in such form as may be prescribed, if it is prima-facie disclosed that the respondent is committing, or has committed an act of domestic violence or that there

is a likelihood that such an act may be committed.

11. Reference to Section 26 is also warranted. Section 26 is a special provision contained in the Domestic Violence Act 2005. By virtue of the said section the relief which is available to an aggrieved person under Section 18, 19, 20, 21 and 22 can also be sought in proceedings instituted before the Civil Court, Family Court or Criminal Court. Section 26 reads thus:-

“Relief in other suits and legal proceedings – (1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in my legal proceeding, before a civil Court, family Court or a criminal Court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and alongwith any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal Court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Section 27 determines the “Jurisdiction” and the jurisdiction to be exercised by the Magistrate depend on the local limits within which the parties are either residing or where the cause of action has arisen. Section 28 provides the “Procedure” to be followed and it is to be noted that all proceedings under Section 12, 18, 19, 20, 21 22 and 23 and offence under Section 31 shall be governed by the provisions of the Code of Criminal Procedure. Sub-section (2) envisages that the Court

may lay down its own procedure for disposal of application for any relief or for passing ex parte order. The said Enactment also contains a provision in form of Section 30 which states that the provisions of the Domestic Violence Act 2005 shall be in addition and not in derogation of the provisions of any other law, for the time being in force.

12. On having bird's eye view of the two Enactments, it is apparent that the two Enactments provide for overriding remedies and reliefs. The forum of Family Court established under Section 3 of the Family Courts Act, 1984 is competent to exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings referred to in the explanation appended to Section 7 and for the purpose of exercising such jurisdiction under such law, is deemed to be a district Court or, as the case may be, subordinate civil Court for the area to which the jurisdiction of Family Court extends. The suits and proceedings amenable the jurisdiction of the Family Court are the suits and proceedings between the parties to a marriage for a decree of nullity, or for restitution of conjugal rights or for judicial separation or dissolution of marriage. The Family Court would also exercise its jurisdiction over the property of the parties to a marriage, injunction for circumstances arising out of marital relationship, declaration as to legitimacy of any person, proceedings for maintenance, guardianship, custody of children,

access of children etc. The Family Court thus exercises the powers of a civil Court and by virtue of Section 10 of the said Act, it is deemed to be a civil Court and has all the powers of such a Court. By sub-section (1) of Section 10 of the Family Courts Act, 1984, the provisions of the Code of Civil Procedure is made applicable to the suits and proceedings before the Family Court except the proceedings under Chapter IX of the Criminal Procedure Code, 1973, which continue to be governed by the provisions of Code of Criminal Procedure, 1973.

As far as the conduct of proceedings under the Domestic Violence Act, 2005 is concerned, the proceedings are initiated on an application being preferred by an aggrieved person or a protection officer or any other person on behalf of the aggrieved person seeking various types of reliefs which the Magistrate is competent to grant under Chapter IX. Section 28 prescribes that all the proceedings under Section 12, 18, 19, 20, 21, 22 and 23 are governed by the Code of Criminal Procedure, 1973. It is, however, permissible for the Court to lay down its own procedure for disposal of an application under Section 12 or under sub-section 2 of Section 23. Since the Code of Criminal Procedure do not contain any provision to grant ex-parte and interim orders, the legislature deemed its fit and expedient to introduce Section 23 and confer the Magistrate with the specific power to pass such interim order as he deems fit and proper. The Family Court which exercises the

jurisdiction of a Civil Court and which is deemed to be a Civil Court, would exercise all the powers of a Civil Court and it is needless to say that it would include the power to grant injunction or any interim orders of any nature by virtue of Order XXXIX Rules 1 and 2. It is also empowered to pass interlocutory orders so as to protect the subject matter of the proceedings. Thus, the Family Court which is deemed to be a civil Court possesses all the powers of a civil Court including its inherent power to grant interim relief, and therefore, a Section analogous to Section 23 of the Domestic Violence Act, 2005 do not find place in the Family Courts Act, 1984.

13. Coming to the present controversy which this Court is called upon to deal with viz. relief that is sought for transfer of proceedings pending on the file of the learned Judicial Magistrate First Class at Cantonment Court, Pune to the Family Court at Pune, the apprehension expressed by the learned counsel for the respondents that the Family Court is not clothed with the powers as the one which is conferred on the Magistrate under Section 23 of the Domestic Violence Act, 2005 is misconceived and since it is already noted above that the Family Court which acts as a Civil Court and since it is vested with all powers of Civil Court which includes specific provision to pass interim orders, the said apprehension can be dispelled and it is to be noted that the Family Court is competent not only to deal with the application preferred

under Section 12 and specifically in the light of the powers conferred by Section 26 of the Domestic Violence Act, 2005 the relief available under Section 18, 19, 20, 21 and 22 can be sought in proceeding before the Family Court and the Family Court being a Civil Court is empowered to exercise all the powers of the Civil Court which would include a power to grant interim and ex-parte orders.

14. A perusal of the proceeding involved in this *lis* would reveal that no doubt there are certain distinct reliefs claimed in two proceedings. It is not the case of the learned counsel for the petitioner to curb the progress of the proceedings or to curtail some of the reliefs, which are sought by the respondents. It is his submission that these two proceedings, in order to avoid decision which will adversely affect either of the parties, could be clubbed together and dealt with by the same Court and it is for the Family Court which is empowered to deal with the said proceedings in the manner which would serve the interest of justice and the interest of parties in a better manner. The prayer of the learned counsel for the petitioner is not to deprive the petitioner of any of the reliefs which she has sought in the Domestic Violence proceedings, but his only claim is that it can be decided before the Family Court effectively and since both the proceedings are instituted by the wife, the Family Court may direct the parties to lead common evidence in support of the overlapping reliefs which are sought and it is

always open for the Family Court to deal with the other issues independently.

15. I find sufficient substance in the said contention of the learned counsel for the petitioner and in the backdrop of the scheme of Enactments which has been discussed above, there is no iota of doubt in my mind that the reliefs sought before the learned Magistrate in the Domestic Violence proceedings can be effectively tried and granted by the Family Court. Further it is settled position of law that the Court which is competent to grant a final relief is also competent to grant an interim relief so as to protect the subject matter of the proceedings before it.

16. The reliance placed by the learned counsel for the respondents in the case of *Dr. Parijat Vinod Kanetkar & Ors. Vs. Mrs. Malika Parijat Kanetkar & Anr. in Criminal Writ Petition No.750 of 2016* decided by the learned Single Judge of this Court at Nagpur Bench is of no succour to the learned counsel for the petitioner and on perusal of the said judgment, it can be seen that the facts involved are distinct and therefore, it called for a deliberation in that context. In the said proceeding, the custody of minor son was granted by the Court of learned Magistrate under the provisions of the Domestic Violence Act and the objection that was raised by the learned counsel for the husband was that in view of the jurisdiction of Family Courts Act, 1984

and availability of the Family Court at Amravati, it was not open for the learned Magistrate to exercise the powers under Section 21 of the Domestic Violence Act. In this backdrop he placed reliance on Section 20 of the Family Court, which reads as follows:-

“Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

However, the learned Single Judge in Para 17 of the said judgment was clearly noted that Section 20 of Family Courts Act of 1984 accords provisions of the said Act a primacy over any other law for the time being in force due to the over-riding effect given to it. But, this overriding effect is only to the extent of inconsistency of the provisions contained in any other law in force with the provisions of the Act 1984. The learned Single Judge also observed that the jurisdiction of the Family Court under both parts of Section 7 do not cover the jurisdiction exercisable by the learned Judicial magistrate First Class in respect of grant of interim custody under Section 21 of the Domestic Violence Act and therefore, there is no question of jurisdiction of the magistrate under Section 21 of the Domestic Violence Act being inconsistent with the provisions conferring jurisdiction upon the Family Court and as such, the Family Courts Act, 1984 will not have any overriding effect upon the Domestic Violence Act. Hence, the said

judgment is distinguishable on facts and cannot be applied to the present case.

17. On careful reading and an understanding of the scheme and the purpose of the two Enactments, I am of the opinion that in order to avoid the multiplicity of litigations and in the interest of the parties, it would be appropriate that the power under Section 24 can be exercised and the proceedings can be clubbed together. Though the learned counsel for the respondents has pointed out that the proceedings have moved ahead and now at this stage if the proceedings are transferred, it would cause prejudice, I am of the opinion that such apprehension is totally misfounded as the Family Court is competent in its jurisdiction to continue the proceedings from the stage at which it has reached and since under Section 10 of the Family Court is also competent enough to derive its own procedure, it will find out its way to ensure that the proceedings are tried in effective and expeditious manner. It would attempt an expeditious disposal of both the said proceedings which are pending since 2013 and 2014 respectively. Since the evidence of the respondent wife in the Domestic Violence proceeding is already over, the Family Court is directed to rely upon the said evidence recorded in the Domestic Violence proceedings by the learned Judicial Magistrate First Class at Cantonment Court, Pune and from that stage by taking the said evidence which is already recorded, the Family Court would

proceed further and the Family Court would also take into consideration the averments that have been raised in the Domestic Violence application preferred before the learned Judicial Magistrate First Class at Cantonment Court, Pune. Whatever the interim reliefs are in operation would remain in force when the proceedings are pending before the Family Court.

18. In view of the aforesaid findings recorded by me, the Writ Petition deserves to be allowed. Rule is made absolute in terms of prayer clause (A). The Family Court at Pune is directed to dispose of the proceedings expeditiously on being transferred and would endeavour to finally dispose of both the proceedings brought before it i.e. P.A.1386/2016 and M.A.No.68/2014 under the Domestic Violence Act, 2005 within a period of six months from the date of passing of this order.

(SMT.BHARATI H. DANGRE, J.)