

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.732 OF 2017

Abhijeet Prabhakar Jail ... **Applicant**

V/s.

Manisha Abhijeet Jail & Anr. ... **Respondents**

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Smt.Seema Sarnaik with Mr.Ameya Tamhane, Advocate for the Applicant.

Mr.Nitin Deshpande, Advocate for the Respondent No.1.

Mr.A.R.Kapadnis, APP for the Respondent No.2/State.

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CORAM : A.M.BADAR J.

DATED : 5th JUNE 2018.

ORAL ORDER :

1 This is an application under Section 407 of the Criminal Procedure Code for transfer of Criminal Application bearing No.523 of 2015 filed by the Respondent No.1/wife from the Court of the learned Judicial Magistrate First Class, Pune to the Family Court at Pune.

2 The Petitioner/husband filed a divorce petition bearing

No.603 of 2015 against the Respondent No.1/wife under Section 13(1)(i) and (ia) for claiming divorce from wife/respondent No.1 Manisha and the same is pending for adjudication at the Family Court, Pune. The Respondent No.1/wife has filed Criminal Application bearing No.523 of 2015 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as “Domestic Violence Act, 2005” for the sake of brevity) in the Court of the learned Judicial Magistrate First Class, Pune for claiming reliefs under the said Act. By the instant petition, the Petitioner/husband is seeking transfer of the proceedings under the Domestic Violence Act, 2005 initiated by the Respondent/wife from the Court of the learned Judicial Magistrate First Class, Pune to the Family Court at Pune, where his petition for divorce against the respondent/wife is pending.

3 Heard the learned Advocate appearing for the Petitioner/husband. She vehemently argued that evidence in both these cases is similar and in order to avoid multiplicity of proceedings, the proceedings under the Domestic Violence Act, 2005 needs to be transferred to the Family Court at Pune, where the divorce petition filed by the Petitioner/husband is pending. The learned Advocate placed reliance on Section 7 of the Family Court Act, 1984, so also on Section 26 of the Domestic Violence Act, 2005 and argued that the Family Court has powers to entertain and dispose of the proceedings under the Domestic

Violence Act, 2005. For this purpose, reliance is placed on Section 26 of the Domestic Violence Act, 2005 as well as Judgment of this Court in *Minoti Subhash Anand v. Subhash Manoharlal Anand*¹ as well as Order dated 22nd March 2018 of this Court in the matter of *Mr.Ujwal Singh Manhas v. Mrs.Jyostna Ujwal Shahi Manhas & Ors.*² The learned Advocate further placed reliance on the Judgment of this Court in the matter of *Mrs.Pramodini Vijay Fernandes v. Mr.Vijay Fernandes*³ in order to demonstrate that the Judge of the Family Court has all powers of the Judicial Magistrate First Class.

4 The learned Advocate for the Respondent No.1/wife opposed the application by contending that there is no question of causing inconvenience to the parties because of pendency of proceedings before two different forums which are situated in the same premises. He argued that allowing the application for transfer would amount to curtailing statutory right of the wife to prefer an appeal challenging Orders passed in the Domestic Violence Act proceedings before the Sessions Court at Pune. For this purpose, reliance is placed on the Judgment of the Honourable Apex Court in the matter of *Garikapati Veeraya v. N.Subbiah Choudhry & Ors.*⁴

1 2016(1) ALL MR 408.

2 Criminal Application No.561 of 2017.

3 Writ Petition No.5252 of 2009 decided on 17th February 2010.

4 AIR 1957 S.C. 540.

5 I have carefully considered the rival submissions and also perused the Judgments relied by both the parties.

6 Undoubtedly, the Family Court has jurisdiction to grant relief under Sections 18 to 22 of the Domestic Violence Act, 2005 vide Section 26 of the said Act. In the matter of ***Mrs.Pramodini Fernandes (supra)***, as seen from paragraph 6 of the said Judgment, an order came to be passed under Sections 18, 19, 20, 21 & 22 of the Domestic Violence Act by the Family Court in that matter. In the matter of ***Minoti Anand (supra)***, it is held that the parties are not in dispute that the reliefs claimed by the applicant therein before the learned Metropolitan Magistrate under the provisions of the Domestic Violence Act can be granted by the Family Court. In the matter of ***Ujwal Singh Manhas (supra)***, it was observed that Section 26 of the Domestic Violence Act gives jurisdiction to the Family Court to grant relief under Sections 18 to 22 of the said Act to the aggrieved person.

7 Under Section 7(2)(b) of the Family Court Act, 1984, the Family Court is empowered to deal with matter which under other law the Family Court can consider. It can exercise such other jurisdiction as may be conferred on it by other enactment. At this juncture, it is necessary to quote Section 26 of the Domestic Violence Act, which reads thus :

“26. Relief in other suits and legal proceedings.—

(1) 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, 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 along with 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.”

Thus, it is clear that the reliefs provided for under Sections 18 to 22 of the Domestic Violence Act can be claimed before the Family Court in any other proceedings in addition to and along with any other relief that the aggrieved person may seek in such legal proceedings before the Family Court. This makes it clear that the Family Court has jurisdiction in a proceeding pending before it to grant reliefs under Sections 18 to 22 of the Domestic Violence Act.

8 However, the application claiming reliefs including those provided for under Sections 18 to 22 of the Domestic Violence Act is required to be filed before the Magistrate which alone has jurisdiction to entertain it. No doubt, an aggrieved person/woman can independently claim such reliefs available to her under the Domestic Violence Act through Civil Court or Family Court, in addition to the relief claimed from those Courts in such proceedings. However, her right to file the proceeding before the Magistrate under Section 12 of the Domestic Violence Act cannot be made sterile by transferring such already initiated proceedings to the Family Court. The proceedings initiated under Section 12 of the Domestic Violence Act before the Court of competent jurisdiction i.e. the Judicial Magistrate First Class, Pune cannot be ordered to be transferred to the Family Court at Pune. Those proceedings will have to be entertained and decided by the learned Judicial Magistrate First Class, Pune itself. The Domestic Violence Act has been enacted to provide for a remedy which is intended to protect the woman from being victim of domestic violence and to prevent the occurrence of domestic violence in the society. The Domestic Violence Act aims at providing speedy remedy to victims of domestic violence and necessary provisions are made in the said Act itself to achieve this object. It provides for disposal of such proceedings in the time found manner within a period of sixty days from the date of first hearing. Order passed by the Magistrate in a proceeding under the Domestic Violence Act

can be challenged in an appeal to the Court of Sessions. However, Order passed by the Family Court can be challenged in an appeal before the Division Bench of the High Court. The Family Court cannot entertain an independent application filed under Section 12 of the Domestic Violence Act.

9 At this juncture, it is apposite to quote the provisions under Section 29 of the Domestic Violence Act, 2005, which reads thus :

“29. Appeal.—There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.

10 In the case in hand, proceedings initiated by the Petitioner/husband are pending before the Family Court at Pune, whereas the proceedings initiated by the Respondent/wife are pending before the Court of Judicial Magistrate First Class, Pune, which are virtually situated in one campus alone. The provisions of Domestic Violence Act, 2005 and more particularly Section 29 thereof provides a right of appeal to the Court of Sessions from the Orders passed by the Magistrate in the said proceedings. Thereafter, the aggrieved woman has right of revision before this Court. In the matter of *Garikapati Veeraya (supra)* relied by the learned Advocate for the Respondent No.1, the Honourable Apex

Court has stated that the right of appeal is not merely the matter of procedural formalities, but it is a substantive right of the parties. Relevant portion of paragraph 23 of the said Judgment read thus :

“23. From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved, to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.”

11 Transferring the proceedings initiated by the wife under the Domestic Violence Act, 2005 before the learned Judicial Magistrate First Class, Pune to the Family Court at Pune would certainly deprive the Respondent/wife from availing statutory right of appeal as provided by Section 29 of the Domestic Violence Act, 2005. There is no question of inconvenience to the parties as both these Courts are virtually situated in one campus alone. Ultimately, the Respondent/wife is the master of litigation initiated by her and she alone is entitled to choose the forum from which she desires to claim relief. The Respondent/wife would be deprived of her statutory right of appeal to the Sessions Court, Pune by transfer of her proceedings under the Domestic Violence Act to the Family Court. There may not be any inconvenience to the parties to both these proceedings as those are pending before two different forums which are virtually situated in the same campus. Moreover, in the case in hand if request of the petitioner/husband is acceded and the proceedings under Section 12 of the Domestic Violence Act are transferred from the file of the learned Judicial Magistrate First Class, Pune to the Family Court, Pune, then the respondent/wife will certainly suffer prejudice as she will have to challenge adverse Orders in her proceedings, if any, passed by the Family Court, Pune before this Court at Mumbai by incurring huge expenses apart from undertaking ordeal of travelling to Mumbai for attending such appeal.

12 In view of reasons set out in foregoing paragraphs, the application is devoid of merits. The application is, therefore, dismissed.

13 At this stage, the learned Advocate for the Petitioner/husband prays for continuation of stay granted by this Court earlier for a period of seven weeks. Though the learned Advocate for the Respondent No.1/wife had opposed this request, in the interest of justice, stay granted earlier is continued for a period of seven weeks from today.

(A.M.BADAR J.)