

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.192 OF 2018**

1. Smt. Theresa D'Souza,
Aged 70 years, unmarried,
Indian National, resident of
House No.1/1, Sautavaddo,
Assgao-Bardez, Goa.

2. Smt. Thelma D'Souza,
married, Indian National,
Aged 73 years, resident of
House No.5, Modlavado,
Villa Oceanic Arambo,
Pernem Goa.

.... Petitioners

V/s

Mr. Norman W. Albuquerque,
Major in age, Resident of
House No.846/2018, Church
Street, Alto Porvorim, Bardez Goa.

.... Respondent

Shri Vivek Rodrigues, Advocate for the Petitioners.
Shri Daniel Andrade, Advocate for the Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 22nd January, 2019

Pronounced on : 29th January, 2019

JUDGMENT :

Rule. Rule made returnable forthwith with the consent of the learned Counsel appearing for the parties. Learned Counsel appearing for the respondent waives service.

2. This petition invoking the jurisdiction of this Court under

Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure takes exception to the order dated 30/04/2018 passed by the Court of Sessions, North Goa, Panaji in the Criminal Appeal No.135/2017 pursuant to which the learned Additional Sessions Judge had allowed the application filed by the respondent under Order XLI Rule 27 of the Code for the production of additional documents.

3. Heard Shri V. Rodrigues, learned Advocate for the petitioners who contended that the respondent had moved an application before the District Court to the effect that the respondent and the petitioners belonged to two different families and the respondent was not a member of the undivided joint family at any point of time. The respondent had not relied upon and produced the earlier deposition of the petitioners in the divorce case wherein she had admitted that he was not a member of their family. The petitioners had filed a criminal case against him and examined the husband of the petitioner no.2 who in his cross-examination had admitted that the petitioner no.1 was not related to him by blood and there was no domestic relationship with him. These documents were realised after going through the impugned judgment and order and therefore,

he was seeking to rely on these documents. Shri V. Rodrigues, learned Advocate for the petitioners contended that this application moved on behalf of the respondent was signed by him in person and there was no affidavit in support thereof.

4. Shri V. Rodrigues, learned Advocate for the petitioners referred to the two statements which were dated 18/02/2008 and 09/12/2015 sought to be produced at the respondent's instance. The Domestic Violence Act proceedings at the petitioners' instance had culminated in an order dated 21/01/2017. The petitioners had filed their reply to the application dated 14/02/2018 filed by the respondent vehemently opposing the same that it was arbitrary, illegal and misconceived in law. The application was filed under the provisions of the Code of Civil Procedure whereas the proceedings under the Domestic Violence Act were enforceable under the Code of Criminal Procedure, 1973. In any event, the documents sought to be produced by the respondent bore no relevance to the matter, was made at a belated stage only to delay the proceedings and to harass the petitioners, not made with due diligence and therefore had pressed for the dismissal of the application. The learned Sessions Judge however, on hearing

the arguments and the relevant proceedings of the Domestic Violence Act held that the provisions thereof were quasi civil and quasi criminal in nature and therefore the provisions of Order XLI Rule 27 CPC would be applicable to the proceedings under the Domestic Violence Act. In her assessment, the application squarely fell within the parameters of Order XLI Rule 27 of CPC and being relevant to decide the appeal had to be allowed and allowed the application.

5. Shri V. Rodrigues, learned Advocate for the petitioners relied in **Union of India V/s. Ibrahim Uddin & Anr. [2012 (5) ALL MR 462 (S.C.)]** and submitted that the Appellate Court was clearly in error in allowing new evidence to be adduced in order to enable the party to raise a new point in appeal. No substantial cause whatsoever had been made out to permit the production of the documents assuming that such powers were vested in the Appellate Court.

6. Shri D. Andrade, learned Advocate for the respondents submitted that the documents were relevant for the purpose of a proper adjudication of the proceedings before the Appellate Court. That the respondent was a member of the joint family

was not an issue before the Trial Court. It was his contention that the proceedings under the Domestic Violence Act were quasi civil and quasi criminal in nature and in that context adverted to Section 26, 28(2) and 36 thereof. He placed reliance in **Ouseph Mathai & Ors. V/s. M. Abdul Khadir [AIR 2002 SC 110]** and in **Shalini Shyam Shetty & Anr. V/s. Rajendra Shankar Patil [(2010) 8 SCC 329]** and otherwise pressed for the dismissal of the petition as not maintainable.

7. i would consider their submissions, the judgments relied upon and the order under challenge and decide the petition accordingly. The protection of Women from Domestic Violence Act, 2005, DV Act for short hereinafter has been enacted 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. It deals with the definition of domestic violence in Section 3, the procedure for obtaining orders of reliefs as contained in Chapter IV in the nature of protection orders, residence orders, monetary reliefs, custody orders, compensation orders, so on and so forth. Section 26 in particular contemplates that the relief available under these

Sections 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. Sub-section 2 in particular provides that 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.

8. Section 28 deals with the procedure. Sub-section (1) provides that save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974). Sub-section (2) in particular provides that nothing in sub-section (1) shall prevent the Court from laying down its own procedure for the disposal of an application under Section 12 or under sub-section (2) of Section 23 of the Act. In other words, a reading of sub-section (2) of Section 28 is not wide enough for the Court dealing with the proceedings under the provisions of the Act to assume powers of a Civil Court when it clearly postulates that the procedure which the Court shall lay down is restricted to the

disposal of an application under Section 12 or under sub-section (2) of Section 23. Besides, even a reading of Section 26 would make it abundantly clear that though the reliefs can be claimed by an aggrieved party under the provisions of the Act, the same can be sought before a Civil Court, a Family Court or a Criminal Court and by no stretch of the imagination can it be heard on behalf of the respondent that the provisions of the Code of Civil Procedure would apply to the proceedings under the Act which are pursued before a Court exercising criminal jurisdiction either original and/or appellate, as the case may be.

9. On that ground itself, the learned Sessions Judge could not have allowed the application under Order XLI Rule 27 CPC to the respondent on the specious premise that the provisions of the Code were applicable to the proceedings under the Act pending before a Court of Criminal jurisdiction. This is besides the fact that the respondent had not been able to show how the deposition recorded as early as 2008 which is part of the public record was not available to the respondent and for that matter the statement thereafter of the petitioner no.2 recorded in December, 2015 as to seek the indulgence of the Court to produce the same only as late as February, 2018. The

respondent for that matter had not at all carved a case that these documents were not available to him earlier and/or that it is only after the exercise of due diligence that the same were traced by him as to bring his case within the parameters of Order XLI Rule 27 accepting for a moment that the same was applicable in the proceedings before a Court of criminal jurisdiction.

10. In **Ibrahim** (supra), a two Judge Bench of the Hon'ble Apex Court observed at para 25 to 29 and 31 as below:

25. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself.

26. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does

not require any additional evidence to enable it to pronounce judgment.

27. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.

28. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.

29. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

31. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late

stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

11. In **Ouseph Mathai** (supra), another two Judge Bench of the Hon'ble Apex Court held that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all the Courts and Tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article cast a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such Courts and Tribunals in accordance with law conferring powers within the ambit of the enactments creating such Courts and Tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction

under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate Courts and Tribunals resulting in grave injustice to any party. It considered the judgment in **Waryam Singh V/s. Amarnath [1954 SCR 565]** where the Apex Court held that the power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors.

12. **Shalini Shyam Shetty** (supra), on a consideration of various judgments including that in **Surya Dev Rai V/s. Ram Chander Rai and others [(2003) 6 SCC 675]**, culled out the following principles on the exercise of the High Court jurisdiction under Article 227 of the Constitution :

a. A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

b. In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially

different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

c. High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.

d. The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in **Waryam Singh** (supra) and the principles in **Waryam Singh** (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

e. According to the ratio in **Waryam Singh** (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts

subordinate to it, 'within the bounds of their authority'.

f. In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

g. Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

h. In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

i. High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of **L. Chandra Kumar v/s. Union of India & others, [(1997) 3 SCC 261]** and therefore

abridgment by a Constitutional amendment is also very doubtful.

j. It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

k. The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

l. On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

m. The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any

disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

n. This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

o. An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality.

13. Considering these judgments and the principles laid down in **Shalini Shyam Shetty** (supra), there is ample warrant for the exercise of jurisdiction under Article 227 of the Constitution of India having come to a clear finding that the Court below had exercised jurisdiction not vested in it and it was not a case

merely of a wrong decision but there was a grave dereliction of duty and flagrant abuse of power by the subordinate Courts. In view thereof, i pass the following

O R D E R

- (i) The Writ Petition is allowed.
- (ii) Rule is made absolute.
- (iii) The impugned order is quashed and set aside.

NUTAN D. SARDESSAI, J.

NH