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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Revision No. 696 of 2017****Order Reserved on 27.11.2019****Order Delivered on 21.01.2020**

Mohd. Ashraf Khan S/o Nawab Khan Aged About 56 Years R/o B-05 Urja Nagar, Deepika, Police Station Deepika, District Korba Chhattisgarh.

---- Applicant**Versus**

Najma Bano D/o Late Shayasuddin Aged About 47 Years Wrongly Shown As Wife Of Mod. Ashraf Khan R/o House Of Tapas Ghosh, Behind House Of Dr. Madhuliaka Mishra, Talapara Road, Vinoba Nagar, Ward No. 13, Police Station Tarbahar, District Bilaspur Chhattisgarh.

---- Respondent

For the Applicant	:	Shri K.A. Ansari, Senior Advocate with Shri Vipin Singh, Advocate.
For the Respondent	:	Shri Rajesh Kumar Kesharwani, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV ORDER**

1. This revision has been brought challenging the legality, propriety and correctness of the order passed by the Learned Fourth Additional Sessions Judge, Bilaspur in Criminal Appeal No.49 of 2017 by which the order passed by the Judicial Magistrate First Class, Bilaspur dated 29.9.2015 was set aside and reliefs were granted to the respondent under the provisions of Protection of Women from Domestic Violence Act, 2005 (for short 'DV Act, 2005).

2. It is submitted by counsel for the applicant that the applicant got divorced with the respondent on 13.1.2009. The application under Section 12 of the DV Act, 2005 was filed by the respondent on

18.12.2012 and the learned JMFC passed the order dated 29.9.2015 rejecting the said application. The appeal filed by the respondent under Section 29 of the DV Act, 2005 has been erroneously allowed by the Appellate Court. It is further submitted by the applicant that the respondent being a divorcee did not have any *locus standi* to file the application under Section 12 of the DV Act, 2005. As the relationship between them has come to an end on 13.1.2009 and the respondent had started living separately; the respondent is no longer a member of the family and that being so she cannot claim the reliefs and protection under the provisions of DV Act, 2005. The applicant was also prosecuted by the respondent for the commission of offence under Section 498A of the IPC and in the said case bearing No. 274 of 2008 decided on 17.10.2012, the applicant was acquitted of the charge. The applicant has deposited the amount in Sunni Muslim Jamat, Korba area. The receipt of the same is filed as Annexure-P/3 and the decision of the Jamat is filed as Annexure-P/4.

3. Relying on the judgment of Nagpur High Court in the case of **Smt. Sadhana vs. Hemant in Criminal Revision Application (REVN) No.121 of 2018** decided on 18.4.2019 by a Single Bench, it is also submitted that after the severance of matrimonial relationship between the parties, the complaint under the DV Act, 2005 would not be maintainable. There has to be a domestic relationship between the parties covered under the definition in DV Act, 2005. The respondent is already receiving maintenance under Section 125 of Cr.P.C. Therefore, it is a case in which there is no incidence of domestic violence with the respondent on the date she has filed the application under Section 12 of

the DV Act, 2005. Reliance has also been placed on the judgment of Delhi High Court in the case of **Harbans Lal Malik vs. Payal Malik** in **Criminal Revision Petition No.253 of 2010** dated 29.7.2010 and also on the judgment of Punjab & Haryana High Court in the case of **Amit Agarwal and others vs. Sanjay Aggarwal and others** in **Criminal Misc. No. M-36736 of 2014** decided on 31.5.2016 wherein, it has been held that after the domestic relationship has come to an end, the application under Section 12 of the DV Act, 2005 shall not be maintainable.

4. Learned counsel for the respondent submits that all the facts and circumstances of this case are in favour of the respondent. The definition of aggrieved person under Section 2(A) of the DV Act, 2005 and this act very clearly mentions that the relationship between two persons can either be continuing or could have existed at one point of time; therefore, the divorce between the parties makes no difference. The applicant has not challenged the order of maintenance passed against him by the Family Court.

5. Relying on the judgments of the Supreme Court in the cases of **Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori and another** reported in **2014 (1) SCC 736** and **Shamim Ara vs. State of U.P.** reported in **2002(7) SCC 518**, it is submitted that the revision filed is without any substance. It is also submitted that the present revision filed against the order of the Appellate Court is not maintainable as there is no provision to file any revision against the appellate order under the Protection of Women from Domestic Violence Act, 2005, as such, the

revision be dismissed.

6. In reply, it is submitted by counsel for the applicant that the revision against the order of the Appellate Court is maintainable. It has been clearly held in **Amit Agarwal's case (supra)** and **Harbans Lal Malik's case (supra)**. This point has been elaborately decided by the Full Bench of Allahabad High Court in the case of **Dinesh Kumar Yadav vs. State of U.P. and Anr. in Criminal Revision No.582 of 2016** decided on 2.8.2016. Therefore, this revision is maintainable and the applicant is entitled for relief.

7. Heard both counsel for the parties and perused the material available on record.

8. Firstly, the maintainability of the revision petition is considered. This point has been elaborately discussed in the judgment of Full Bench of Allahabad High Court in **Dinesh Kumar Yadav's case (supra)** in which it has been held after elaborate discussion that as the remedy of an appeal has been provided under Section 29 of the DV Act, 2005 before a Court of Sessions which means a Court of Sessions referred under Section 6 read with Sections 7 and 9 of the Cr.P.C. without saying anything more regarding the procedure to be followed in such an appeal, there being nothing contrary to the DV Act, 2005 which may be indicative of the application of the provision of Cr.P.C. to such an appeal. The normal remedies available against the judgment and order passed by a Court of Sessions by way of appeal and revision is prescribed under the Cr.P.C. before the High Court which is also available against the order passed in

appeal under Section 29 of the DV Act, 2005, therefore, this case law holds ground and the revision against the appellate order is found to be maintainable.

9. The only question raised by the applicant in this case is regarding the maintainability of the proceeding against him under the provisions of the DV Act, 2005 on the ground that on the date of filing an application there existed no relationship between the parties. In the application filed by the applicant under Section 12 of the DV Act, 2005 there is no mention of divorce between the parties. The respondent has pleaded that she has driven out of her matrimonial home on 11.5.2008 and since then she is living separately. The applicant had submitted his reply and made a statement that he had divorced the respondent on 13.1.2019 in accordance with Muslim law.

10. Respondent – Najma Bano (AW-1) has not made any statement in her examination-in-chief regarding the dissolution of marriage and has denied the question put to her in cross-examination that the applicant has divorced her. There is similar statement of denial by the other witnesses from the applicant's side. The applicant in this case i.e. Mohd. Ashraf Khan as (NAW-1) has stated in his examination-in-chief that he has divorced the respondent on 13.1.2009 and produced the photocopy of Talaknama and also the photocopy of decision of Muslim Jamat dated 20.1.2009. In cross-examination, he has admitted that the respondent after leaving him in 2008 has not come back. He has denied adverse suggestions given in cross-examination. Arif Khan (NAW-2) is son of the applicant who has given statement that his father has divorced the

respondent in the year 2009. In cross-examination, he has admitted that he had hearsay knowledge regarding the divorce. Similar is the statement of another witness from applicant's side Shakeel Ahmed. According to him, he has heard about the divorce of the applicant with his wife/ the respondent.

11. The respondent has claimed that no divorce has taken place whereas, the applicant had pleaded regarding the divorce between him and the respondent. Therefore, the burden was upon to the applicant to prove the factum of divorce as it was required for the purpose of coming to a conclusion in this case. According to the statements given in the non-applicant's evidence by the witnesses, it is found that on 13.1.2009 when the said divorce took place, the respondent was not present before the applicant. The applicant himself has made only an oral statement and filed photocopies of the documents regarding divorce and the decision of the Muslim Jamat. No effort has been made by him to produce the original divorce paper or to produce the witness of said divorce since according to the muslim law, it is essential that divorce should took place in presence of witnesses. There is also no statement or evidence that the divorce has taken place in presence of witnesses. There is also no statement or evidence that the said divorce/ talak was communicated to the respondent, because under Muslim Law the communication of Talak is also essential. In Shamim Ara's case (supra), the Supreme Court has held in paragraph 16 is as under:

'We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (See Chambers 20th Century

Dictionary, New Edition, p.1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent No.2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr.Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter partes, containing a self-serving statement of respondent no.2, could not have been read in evidence as relevant and of any value.'

12. There is no evidence from the applicant's side that talak was pronounced or formally proclaimed and the same was communicated to the respondent. Therefore, it cannot be said that the divorce under muslim law has effectively taken place between the applicant and the respondent. Hence, on the basis of this finding, I am of this view that the

learned Appellate Court has not committed any error and the impugned order needs no interference.

13. Accordingly, this revision petition is dismissed.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nimmi