

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 322 OF 2019

Chotulal Narsing Pawara,
Age : 60 Years, Occ. Service,
R/o. Bhogwada Taluka Akrani,
District Nandurbar. ... Applicant

Versus

Gitabai Chotulal Pawara,
Age : 38 Years, Occ. Labour & Sewing
Work, R/o. Shelkuvli, Taluka Akrani,
District Nandurbar. ... Respondent

....
Advocate for the Applicant : Mr. S.S. Savale
Advocate for Respondent : Mr. R. B. Temak
....

CORAM : SURENDRA P. TAVADE, J.

DATE : 23.08.2021

PER COURT :-

The revision applicant is challenging the order passed by learned Judicial Magistrate, First Class, Dhadgaon, District Nandurbar dated 20. 10. 2016 in Criminal Misc. Application No. 42 of 2014. The applicant is also challenging the Judgment and order passed by learned Ad-Hoc Additional Sessions Judge, Shahada, District Nandurbar dated 01st October, 2019 in Criminal Appeal No. 26 of 2016 whereby the learned Additional Sessions Judge has confirmed the order dated 20.10.2016

passed by the learned Judicial Magistrate First Class, Dhadgaon, District Nandurbar in Criminal Miscellaneous Application No. 42 of 2015. The facts in the criminal revision application are as under :-

2. The respondent is the second wife of the applicant. She had filed Criminal Misc. Application No. 42 of 2015 under Section 12 of the Protection of Women From Domestic Violence Act, 2005 (herein after referred as D.V. Act') which was allowed by the learned Judicial Magistrate First Class Dhagaon, District Nandurbar. The said order was confirmed by the learned Ad-hoc Additional Sessions Judge Shahada District Nandurbar. It is contended that the respondent is not legally wedded wife of the applicant. Ushabai is the first wife of applicant. Their marital tie is subsisting, therefore, the respondent has not proved the domestic relationship as well domestic violence, but the trial Court has simply considered the allegations made in the complaint and allowed the same. It is contended that the second wife does not get the status of wife as expected in definition of domestic relation. The said aspect is not properly considered by the trial Court, as well as the first appellate Court, hence both the orders are required to be quashed and set-aside.

3. On the other hand learned counsel for respondent submits that the marriage of the applicant and the respondent was performed with consent of the first wife. It is contended that the first wife of the applicant did not conceive child, therefore, the applicant married with respondent. The applicant and the respondent resided as husband and wife for long period and therefore, their relation was recognized by the society as husband and wife. It is contended that the applicant forced the respondent to have sexual relations with his friend and others, for many occasions, therefore, she had lodged complaint with the police. It is contended that the applicant caused harassment and ill-treatment to the respondent in shared household, therefore, provisions of Domestic Violence Act are applicable. Hence the trial Court, as well as the Appellate Court have rightly granted maintenance to the respondent. The said orders are legal and proper, therefore, there is no need to interfere with them.

4. Heard the learned counsel for the applicant as well as the respondent.

5. The learned counsel for the applicant has produced on record Judgment and order passed in Sessions Case No. 13 of

2016 passed by the learned Additional Sessions Judge, Shahada, District Nandurbar whereby, the applicant and two others were prosecuted for the offences punishable under Sections 498-A, 376, 504, 506 read with Section 34 of the Indian Penal Code. In the said case the applicant and others were acquitted, wherein, there is specific finding that the respondent is second wife of the applicant. On the basis of said Judgment, learned counsel for the applicant submits that the allegations of rape and forcing respondent to have sexual relationship with others are not proved at all. On going through the Judgment, it appears that the allegations leveled by the respondent against the applicant and others were held to be not proved.

6. The learned counsel for the applicant has also produced on record the copies of depositions of respondent, recorded in Sessions Case No. 13 of 2016, wherein, the respondent has categorically admitted that Ushabai is the first wife of the applicant. It appears from the evidence that the applicant has no issue out of the first marriage, therefore, he contacted second marriage with the respondent. In view of the said fact, one has to see the definition of domestic relationship described in Section 2-F of the Protection of Women from Domestic Violence Act, 2005, which runs as under :-

2(f)“domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.”

7. In the said definition one has to see, whether the second wife is included for the domestic relationship during the subsistence of first marriage of her husband. The said aspect is dealt with by the Apex Court in the case of **D. Velusamy Vs. D. Patchaiammal reported in 2010 AIR SCW 6731 (Supreme Court)** wherein it was observed that

“ In our opinion a relationship in the nature of marriage is akin to a common law marriage. Common law marriages require that although not being formally married :-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry :

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. “

8. Clause 'C' of the above observation is very crucial in present case, the Apex Court held that that the parties to marriage must be otherwise qualified to enter into a legal marriage, including being unmarried.

9. In the present case the applicant was firstly married to Ushabai and his marriage was subsisting at the time of his marriage with the respondent. It appears that the marriage of the applicant and the respondent was performed for conceiving child but fact remained on record that the respondent knew that the applicant was married . In fact, it appears that the marriage was performed with the consent of first wife of applicant. Be that as it may, the said marriage cannot be called as legal marriage as per the observations of the Apex Court.

10. The learned counsel for the applicant also relied on the ratio laid down in the case of **Indra Sarma Vs. V.K.V. Sarma (2013) reported in 15 Supreme Court Cases 755.** It is held that

“All live-in relationships are not relationships in the nature of marriage. Relationship to qualify as “ relationship in the nature of marriage” should have some inherent or essential

characteristics of a marriage though not a marriage legally recognized”.

11. In the said case the appellant was unmarried woman and respondent was married male. The case of the appellant therein, was that the appellant was having live-in relationship with the respondent. On the above fact it was held that the alleged live-in relationship between the appellant and the respondent was not relationship in the nature of marriage as defined under Section 2 (f) of the Protection of Women from Domestic Violence Act, 2005.

12. The Apex Court has also observed that the appellant/ wife entered into live-in relationship with the respondent/ husband with the knowledge that he was having a wife and two children. The status of marriage of the appellant is that of a concubine or mistress. There is also no need to rebut the presumption of marriage raised from long cohabitation of the appellant and the respondent, as she was aware of marital status of respondent prior to commencement of their relationship.

13. In the present case, the respondent knew that the applicant was married to one Ushabai and his first marriage is

subsist still she married with the applicant having knowledge of his first marriage. Therefore, the status of the respondent cannot be called as legally married wife of the applicant. Once it is held that there is no domestic relationship between the applicant and the respondent the question of granting any relief under the Domestic Violence Act does not arise.

14. It appears from the impugned order that the trial Court has simply considered the allegations made in the application, in respect of domestic relationship and domestic violence and granted the maintenance. The trial Court did not consider the status of so called marriage of the respondent with the applicant. Therefore, the impugned order is required to be set aside. The first appellate Court has also not considered the definition of domestic relationship and domestic violence in proper perspective. The respondent was second wife of the applicant, though she was residing in shared household with the applicant, still she has not acquired the status of wife, through alleged marriage. In view of the ratio laid down by Apex Court in cases cited supra, the relationship between the applicant and the respondent cannot be called as domestic relationship, therefore she is not entitled to claim any relief under domestic violence Act, therefore the order dated 20.10.2016 passed by

the learned J.M.F.C. Dhadgaon in Criminal Misc. Application No. 42 of 2015 below Exh. 13 and impugned order dated 01.10.2019 passed by the learned Additional Sessions Judge, Shahada in Criminal Appeal No. 26 of 2016 are required to be set-aside. Hence I pass following order.

ORDER

- (i) The application is allowed.
- (ii) The impugned order passed by the learned J.M.F.C. Dhadgaon in Criminal Misc. Application No. 42 of 2015 below Exh. 13 and impugned order dated 01.10.2019 passed by the learned Additional Sessions Judge, Shahada, District Nandurbar in Criminal Appeal No. 26 of 2016 are hereby set-aside.

**(SURENDRA P. TAVADE)
JUDGE**

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