

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 23rd November, 2021**
Pronounced on: 14th December, 2021

+ **CRL.REV.P. 533/2018, CRL.M.A. 11290-93/2018, CRL.M.A. 48776/2018, CRL.M.A. 12937/2021 & CRL.M.A. 16918/2021**

MONISH DAS

..... Petitioner

Through: Ms. Tanya Agarwal, Ms. Eliza
Siram and Mr. Durga Vashist,
Advocates

versus

RUBINA RATHORE

..... Respondent

Through: Mr. Arvind Chaudhary, Mr. Arpit
Saini and Mr. Praveen Sharma,
Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant criminal revision has been filed by the Revisionist/Petitioner (hereinafter "Petitioner") under Sections 397/401 read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C.") seeking revision against impugned order and judgment dated 9th June 2017 passed in CA No. 53/16 (8297/16) under Section 29 of the Protection of Women from Domestic Violence Act,

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2005 (hereinafter “DV Act”) titled "Ms. Rubina Rathore v. Monish Das & Anr.' passed by learned Additional Sessions Judge/Special Judge (PC Act), (CBI-3), South, Saket Courts, New Delhi.

FACTUAL MATRIX

2. The disputes are arising out of matrimonial relations between the parties, the Petitioner being the husband and Respondent being the wife. The marriage between the parties was solemnized on 6th May 2011 according to Hindu rites and ceremonies. Due to the temperamental differences, Petitioner and Respondent decided to live separately and despite attempts of reconciliation, the relationship ultimately broke down. Subsequently four FIRs got registered by the Respondent-wife against the Petitioner-husband and his mother. Out of four FIRs, two were registered in Delhi and two were registered in Udaipur. The complaint case under Section 12 of DV Act has also been filed by the Respondent against the Petitioner and mother-in-law in the Court of Metropolitan Magistrate-02 (Mahila Court), South District, Saket Courts, New Delhi. The said application was registered as CC No. 378/1/14 (20.08.2014)/(464268/2016). Learned Metropolitan Magistrate decided the said compliant *ex parte* vide judgment and order dated 20th August 2016. The operative portion of the said judgment reads as under:-

49. Hence, in the present case in the absence of the assets and liabilities of the Respondent no.1 having been proved by way of cogent evidence by the aggrieved, keeping in view the standard of living of the parties as asserted by the aggrieved herself in her pleadings, as also the fact that the marriage between

the parties was an arranged marriage where the standard of the parties is likely to be similar to each other, the income of the Respondent no.1 even by conservative estimates where he is not alleged to be differently abled being a MA Post Graduate, is presumed to be not less than Rs 75,000/- per month. As the aggrieved was in a domestic relationship with the Respondent no. 1 with certain savings but without any source of income except income from certain interest income of approx. Rs 10,000/- pm, and is not possessed of sufficient means of sustaining herself, as also keeping in view that it is the legal duty of the Respondent no.1 to maintain her and the minor child born out of the relationship, therefore, on the scale of balance of convenience, after dividing the income of the Respondent no. 1 into about five parts with two for the Respondent no. 1, one for the first wife and one each for the aggrieved and her minor son, I deem it fit to award a sum of Rs.20,000/- per month to the aggrieved as well as Rs 25,000/- towards her minor child by the Respondent no.1 as monetary relief. Needless to mention that this includes rent towards alternative accommodation because aggrieved despite having a right to reside in the shared household is residing separately therefrom. The amount shall be payable from the date of filing of the petition till the aggrieved and her minor child becomes dis-entitled for the same as per law.

50. Respondent no.1 shall pay the awarded amount directly into the account of the aggrieved upon supplying the details of the bank account within three weeks from today to the Respondent no.1 and filing a copy on record. The amount shall be payable by 10th day of every English calendar month starting from the next month. The arrears be cleared within the period of six months.

51. The default shall be viewed in terms of the judgment of Hon'ble High Court in Gaurav Sondhi vs. Divya Sondhi-120 DLT(2005)426. Any maintenance that may have already been paid or has been awarded by any other forum, shall be accordingly adjusted.

52. **Compensation** Under Section 22 of Protection of Women From Domestic Violence Act: The aggrieved has sought Rs. 50 lakhs as compensation and further sum of Rs. 1.25 lakhs towards litigation expenses. She has however not led any evidence to prove her entitlement for the claimed amount in as much as she has not even filed receipts of her litigation expenses. Be that as it may, as it has gone unrebutted that she has been subjected to domestic violence she is awarded compensation of Rs 15,000/- and litigation expenses of Rs 10,000/- to be paid by the Respondent no.1 to the aggrieved. No grounds exist for granting any other relief in favour of the aggrieved.

53. Application of the aggrieved under Section 12 of the Protection of Women From Domestic Violence Act, 2005 is accordingly disposed off in the said terms.

54. Copy of this order be given dasti to the aggrieved and be also sent to the local service provider if any. As the Respondent no.1 is ex-parte, a copy of this order be served upon him through the Protection Officer.

3. The appeal under Section 29 of DV Act was filed by the Respondent before the Court of Additional Sessions Judge/Special Judge CBI-03 (PC Act), South District, Saket Courts, New Delhi against the *ex-parte* judgment dated 20th August 2016 passed by learned Metropolitan Magistrate for modification and enhancement of the maintenance as awarded. The Petitioner herein, filed the reply in the aforesaid appeal and contended that notices and summons issued by the Magistrate in the

complaint filed by the Respondent were not properly served upon him and the impugned judgment and orders were passed by the learned Magistrate *ex-parte* and without hearing the Petitioner. Therefore, the order impugned in the said appeal is liable to be set aside. It is also contended by the Petitioner herein that without any evidence, his income could not have been presumed to be Rs.75,000/- (Rupees Seventy Five Thousand) per month. It is also contended in the reply that while calculating the maintenance amount, learned Magistrate had sought to pay 1/5th out of Rs.75,000/- to the Respondent herein and her minor son, each, but infact, they were awarded Rs.20,000/- (Rupees Twenty Thousand) and Rs.25,000/- (Rupees Twenty Five Thousand) per month, respectively. The Appellate Court vide order dated 9th June 2017 confirmed the order dated 20th August 2016 of learned Metropolitan Magistrate. The instant criminal revision petition is preferred against the order dated 9th June 2017 passed by the Appellate Court.

SUBMISSIONS

4. Ms. Tanya Agarwal, learned counsel appearing on behalf of the Petitioner submitted that the *ex-parte* judgment passed by the learned Trial Court was without application of judicial mind and the judgment of Appellate Court upholding the *ex-parte* award passed by the learned Trial Court was erroneous, improper and illegal.

5. The learned counsel for the Petitioner submitted that the summons before the learned Trial Court were not served to the Petitioner in accordance with law and as such the Petitioner was not given a proper

and reasonable opportunity to be heard. It is the case of the Petitioner in terms of the summons served upon him that, firstly, he was not residing at the place where summons were served and moreover, assuming that the Petitioner was residing at the said place, the service was not made in accordance with the provisions of the DV Act, Cr.P.C as well as the Code of Civil Procedure, 1908 (hereinafter “CPC”).

6. Learned counsel for the Petitioner, reiterated the facts of the case to state that vide Order dated 3rd May, 2014, the learned Trial Court directed to serve the notice to the Petitioner through Registered Courier/Acknowledgement Due (hereinafter “RC/AD”) and in compliance of the order the Process Server was supposed to serve the summons in accordance with the provisions laid down. However, on 14th August, 2014, when he approached the known residence of the Petitioner and came to know that he was not present at the address and had left for Delhi, he affixed the summons on the door. The learned counsel for Petitioner submitted that despite the directions of the learned Metropolitan Magistrate, there is no proof or record to show that service was affected through RC/AD.

7. The learned counsel for the Petitioner opposed the procedure carried out by the Process Server and submitted that according to provisions of the CPC under Order V Rules 9, 12, 13, 15, 17 and 19, the Process Server was supposed to, first, make all efforts laid down under the CPC to serve the summons in person to the Petitioner and then only upon his complete inability to furnish the summons in person should have resorted to affixation. She vehemently submitted that as per the laws laid

down under DV Act, CPC and Cr.P.C and various citations, service of summons in person is the rule and service by affixation is the exception.

8. The learned counsel for Petitioner submitted that Appellate Court did not consider that there are only limited circumstances where service in person can be dispensed with. When the serving officer has acted with reasonable and due diligence but cannot find the defendant, there is no likelihood of him returning to his residence and there is no agent or any other person upon whom service can be made, it is only then that the officer shall affix the copy of the summons on a conspicuous part of the house.

9. Learned counsel for the Petitioner relied on ***Cohen & Anr vs. Nursing Dass Auddy, (1891) ILR 19 Cal 201***, wherein it was held hereinunder: -

“1... It is true that you may go to a man's house and not find him, but that that is not attempting to find him. You should go to his house, make enquiries, and if necessary, follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found--not as seems to be done in this country, to go to his house in a perfunctory way, and because he has not been found there, to affix a copy of the summons on the outer door of his house.”

10. The learned counsel for Petitioner, further, relied on the decision of ***Bondla Ramalingam vs. Shiv Balasiddiah, (1978) SCC Online AP 232***, which noted as under:-

“6. When he goes for the first time to his house and if he is not found in the house, he has to make efforts as to when he would be available next time and must try to serve on him.”

11. The learned counsel for the Petitioner also relied on ***Hari Narayan & Ors. vs. Topkhana Desh Grah Nirman Samiti Ltd., 1997 SCC Online Raj 18***, where it was held as under:-

“3. Close scrutiny of the record reveals that the process server had gone to the house of the Defendant on 8.4.1992, for the final time and on finding that the defendants had gone out he affixed summons on outer door of their house.

5. In the instant case the process server did not care to use due and reasonable diligence in finding the defendants, without making efforts to find out as to when the defendants would be available next time and trying the summons on them the process server affixed the summons on the outer door. ... these infirmities cannot be merely termed as irregularities. I am of the considered view that the provisions of Order 5, Rule 17, CPC have not been complied with by the process server in the instant case.”

12. In light of the decisions mentioned above, it is submitted the Appellate Court did not consider that the twin conditions mandated under Order V Rule 17 CPC were not satisfied while serving of summons before the learned Trial Court. She submitted that the Process Server, acting in prudence and caution, should have made atleast three attempts to find the Petitioner and serve the summons to him in person. It is submitted that there was a mala fide intent on part of the Respondent to

prevent service upon the Petitioner because there was no attempt by the Petitioner to avoid service or appearance in proceedings of the Court.

13. With regard to the issue of maintenance, the learned counsel for the Petitioner submitted the learned Appellate Court and the learned Trial Court erred in presuming the monthly earning of the Petitioner to be Rs. 75,000/- (Rupees Seventy Five Thousand only), since, the Petitioner had placed salary slips, appointment letters and resignation letters which showed the contrary. Moreover, the fact that he had been unemployed since 2010 was affirmed by the Respondent too and as such the averments made by the Respondent regarding income and assets of the Petitioner were bald allegations with no documentary evidence to support the same. It was, further, submitted that during the proceedings in bail matters pending before this Court, vide Order dated 2nd December, 2015, he was directed to pay a sum of Rs. 20,00,000/- (Rupees Twenty Lakhs only) to the Respondent and which was subject to future adjustment. It is submitted by the learned counsel for the Petitioner that the said 20 lakhs were to be adjusted against the maintenance awarded to the Respondent by the learned Trial Court.

14. Learned counsel for the Petitioner submitted that the proceedings under DV Act are not similar in nature to those for maintenance under Section 125 Cr.P.C or the Hindu Adoption and Maintenance Act, 1956. The proceedings under DV Act require a finding that the husband is guilty of domestic violence and only then the Magistrate could proceed to adjudge upon the reliefs sought by the wife. It is submitted that not

affording an opportunity of hearing in domestic violence proceedings had serious ramifications and caused grave prejudice to the husband.

15. Upon enquiry by this Court regarding filing of any application/appeal for setting aside the impugned judgment of the learned Trial Court dated 20th August, 2016, the learned counsel for the Petitioner submitted that although such an application or appeal was not filed, however, before the learned Appellate Court one of the prayers seeking setting aside of the said judgment was made in the reply. Learned counsel, referring to paragraphs 19 to 21 of the impugned judgment, submitted that since, there was a specific prayer clause seeking setting aside of the order dated 20th August, 2016, and the learned Appellate Court had given observations in light of the said prayer as well, the reply was treated as cross-appeal.

16. Learned counsel for the Petitioner submitted that the DV Act, being a special Act, does not provide a provision in accordance of which an application for setting aside *ex-parte* order may be made. Since, there is no provision under the DV Act, one has to rely on Cr.P.C for making such an application. It is submitted that Section 362 Cr.P.C enables filing of recall/review only to correct a clerical or arithmetical error and even Section 25 (2) of the DV Act, also gives a limited scope to the Magistrate to alter, modify or revoke any order on the ground that there are changes in circumstances.

17. The learned counsel for the Petitioner further, relied on the Order 41 Rule 33 CPC, and the cases of *State of Punjab vs. Bakshish Singh*,

(1998) 8 SCC 222, and *Pralhad & Ors vs. State of Maharashtra & Anr* (2010) 10 SCC 458, to submit that the powers of Appellate Court are wide enough to pass any decree and make an order even in instances where there is no appeal or cross-objections filed the Respondents. It is submitted that the protection under Order 41 Rule 33 of CPC cannot be denied mere on the ground of non-filing of any appeal. It is submitted that in view of the aforesaid discussions, it is crystal clear that the Appellate Court committed grave error and illegality while passing the impugned order, therefore, it deserves to be set-aside.

18. *Per contra*, Mr. Arvind Chaudhary, learned counsel appearing on behalf of the Respondent vehemently opposed the contentions and arguments made by the Petitioner.

19. Learned counsel for the Respondent assailed that the conduct of the Petitioner throughout the proceedings of the case before the learned Trial Court and the Appellate Court has been in gross abuse of the rights granted to him under law. It is submitted that the Petitioner had only appeared before the learned Trial Court at the time when the matter was listed for orders and not before that. Learned counsel for the Respondent pointed out order of the learned Trial Court, dated 29th September, 2014, 18th October, 2014, 24th January, 2017, 25th April, 2017, wherein it was observed on various accounts that the Petitioner or his counsel had failed to appear or abide by the orders of the learned Trial Court regarding filing of pleadings, furnishing of residential details etc. Opposing the averments made by the Respondent, learned counsel for Petitioner submitted that the conduct of the Respondent had also been objectionable throughout, since,

she had filed multiple complaints against the Petitioner but chose to remain silent about the DV proceedings, which exhibited the intention of the Respondent of preventing appearance of the Petitioner before the Court.

20. Learned counsel for the Respondent further submitted that the Petitioner, acting most perjurally, presented a forged judicial document, that is, the decree of divorce from his first marriage, on pretext of which he married the Respondent, and by the same his fraudulent intentions and motive of extorting money out of the Respondent was apparent.

21. Learned counsel for the Respondent reiterated the fact that a considerable amount of more than Rs. 50,00,000/- (Rupees Fifty Lakhs only) was borrowed by the Petitioner on account of starting up a new business, however, neither was the business ever set up nor was the money ever returned to the Respondent thereafter.

22. The learned counsel for the Respondent submitted that since, an application or appeal was never filed against the judgment dated 20th August 2016 at any stage, the Petitioner has not evoked the jurisdiction of this Court in due and proper manner and in accordance of law. It is further submitted that there is no illegality in the order and judgment passed by the Appellate Court and the Petitioner has failed to point out any error apparent on record in the impugned judgment and order. Therefore, the Revision Petition is devoid of any merit and is liable to be dismissed.

ANALYSIS AND FINDINGS

23. Heard the arguments and submissions made by both the parties at length and perused the records, including the Revision Petition and written submissions.

24. At the very first instance, it is pertinent to restate that as a Court exercising Revisional Jurisdiction under Sections 397/401 of Cr.P.C, this Court will restrict itself to the question of correctness, legality and propriety of the judgment passed by the Appellate Court. This is not a stage where this Court will appreciate evidence or go beyond the judgment and findings of the Appellate Court.

25. It is apparent from the lower court records that the Petitioner had been abstaining from appearing before the learned Trial Court during the course of proceedings under the DV Act. The learned Trial Court had at various occasions noted the absence of the Petitioner before the Court and gave enough opportunities to the Petitioner to appear before the Court and make his representation. However, the Petitioner failed to appear and this indisposition indicated that he had been attempting to flee from justice. Though, the conduct of the parties cannot be the sole ground for this Court for deciding the instant revision, however, the same cannot not be completely overlooked as well, especially, when it can be seen that the Petitioner has not taken any appropriate steps at the right occasion within the purview of limitations available to him under the law and now after five years of pending litigations has, under the garb of CPC and Cr.P.C

conveniently, raised an objection to the decision of the learned Trial Court, decided against him.

26. One of the other main contentions of the learned counsel for the Petitioner has been that the reply filed to the Appeal of the Respondent before the Appellate Court was treated as a cross-appeal, based on the prayer made by the reply. For this submission, learned counsel for the Petitioner also relied on several judgments and provisions of the CPC to assail that the degree and scope of powers a Court while exercising Appellate powers, under Order 41 Rule 33 of the CPC, are wide enough to exempt non-filing of the setting aside of order or appeal by the parties before the Appellate Court and be heard despite the same.

27. To decide upon this argument, it is necessary to understand the nature of the powers provided to the Appellate Courts under Order 41 Rule 33 of the CPC. The Hon'ble Supreme in ***Rameshwar Prasad vs. Shambhari Lal Jagannath***, (1964) 3 SCR 549 has observed as under: -

“50. ... Rule 33 really provides as to what the appellate court can find the appellant entitled to. It empowers the appellate court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order in so far as it affects the rights of the appellant. It empowers the appellate court to pass or make such further or other decree or order as the case may require. The Court is thus given wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties.”

28. The Hon'ble Supreme Court in ***Nirmala Bala Ghose vs. Balai Chand Ghose, (1965) 3 SCR 550***, has discussed the powers under Order 41 Rule 33 and have observed as under: -

“23. ... The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties.... The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.”

29. In ***Mahant Dhangir vs. Madan Mohan, 1987 Supp SCC 528***, the Apex Court laid down as under: -

“15. ...The Appellate Court could also pass such other decree or order as the case may require. The words “as the case may be require” used in Rule 33, Order 41 have been put in wide terms to enable the Appellate Court to pass any order or decree to meet the ends of Justice. What then should be the constraint? ... The only constraint that we could see, may be these: That the parties before the lower court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower court. It is true that the power of the Appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties.”

30. The Hon'ble Kerala High Court in ***MM Philip vs, Kerala State, 2009 SCC Online Ker 5840*** has noted as under: -

“22. Rule 33 of Order XLI of the Code of Civil Procedure is based on the principle that the appellate court should have the power to do complete justice between the parties. It also aims to avoid contradictory decrees. The Rule confers wide discretionary power on the appellate court. However, the discretion is to be exercised with great care and caution. No hard and fast rule can be laid down in the matter of exercise of the power. Each case must depend upon the facts of the case....”

31. From the bare reading of the abovementioned judgments, it is clear that the power given to Appellate Courts under Order 41 Rule 33 is discretionary and exceptional. It cannot be said that if an Appellate Court refuses to exercise its powers under Order 41 Rule 33, it is in gross illegality or violation. The Code does not necessitate exercise of the power but gives amplitude discretion to the Appellate Court, to consider the matter based on the facts and circumstances and then if it finds fit, to allow or disallow the plea under Order 41 Rule 33. In the present case also, the Appellate Court, had the option to exercise power under Order 41 Rule 33 but irrefutably, it was just an option and not an obligation. This Court, therefore, does not find force in the argument of the Petitioner that if the Appellate Court has not allowed the prayer of the Petitioner to treat the reply filed by the Petitioner as a cross-appeal, it amounts to gross illegality.

32. It is also important to understand that while the CPC, or the Cr.P.C, is required to steer the legal procedures in the country, it cannot be the one right answer to all the questions. For over hundred years, litigants and professionals have been guided by the CPC over the technicalities and fundamentals laid down under it, that allow them to exercise their rights to the greatest extent, while being within the ambit of properly laid down procedure. The Courts, also, are able to approach any dispute with much comprehension and detail relying on the procedure laid down in the Code. The CPC is, undoubtedly, a lengthy, elaborate, complex and extensive Code for procedure but it should not be the case that the parties after years of matter being pending keep on approaching the Court citing one provision or the other for the sole reason of exhausting their options which they had previously waived or chosen not to exercise. It is found that litigants resort to exhausting all and any provisions they may find in the Code, be it civil procedure or criminal, but in doing so they lose sight of the prejudice to the rights of their clients. In the present matter also, the Petitioner had ample opportunity to exercise the rights conferred to him in due timely and orderly manner by approaching the Court as and when he was aggrieved of the order of the learned Magistrate, but instead he chose to not take an action relying on the protection that he could have under the said Order 41 Rule 33. At this belated stage, after a considerable time has passed, the need for challenging findings of the Trial Court or the Appellate Court is found to be futile as the Appellate Court was not wrong in questioning the Petitioner on the actions taken by him to set aside the order of the Trial Court.

33. On the issue of service of summons upon the Petitioner under the DV Act, it is found that since the Petitioner has not challenged the *ex-parte* order passed by the learned Metropolitan Magistrate at any stage, it attained finality. Now, at this stage, he cannot take the ground of improper service of summons upon him in the Revisional Jurisdiction after lapse of five years.

34. This Court shall not further investigate or adjudicate into amount of maintenance awarded as the same has again been considered at length by the lower Courts by examining all documents and records, including the income and assets affidavit and at this stage, this Court may not be apprised of the evidence for correctness of calculation of the amount of the maintenance.

CONCLUSION

35. After taking in view all the facts and circumstances of this case, arguments advanced as well as the perusal of pleadings, this Court does not find any gross-illegality or impropriety in the findings and analysis of the Appellate Court.

36. The Appellate Court, vide its judgment dated 9th June 2017, has taken the right view in light of the circumstances present before it. This Court does not find any substantial ground for invoking the Revisional Jurisdiction to interfere with the impugned judgment. In view of the above, this revision petition is dismissed as the same is devoid of any merit. No order as to cost.

37. All pending applications stand disposed of.
38. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

December 14, 2021

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