

**IN THE HIGH COURT AT CALCUTTA**

**(Criminal Revisional Jurisdiction)**

**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Shampa Dutt (Paul)**

**CRR 2923 of 2019**

**Srikant Ray**

**Vs.**

**The State of West Bengal and Anr.**

**For the Petitioner** : Mr. Sanjib Mitra,  
Mr. Suryasarathi Basu.

**For the State** : Mr. Narayan Prasad Agarwal,  
Mr. Pratick Bose.

**For the O.P. No. 2** : Mr. Prabir Kumar Mitra,  
Mr. Pinak Kumar Mitra,  
Ms. Ariba Shahab.

Heard on : 20.09.2022

Judgment on : 01.11.2022

**Shampa Dutt (Paul), J.:**

The application is against the judgment and order dated 29.08.2019 passed by the learned Additional District and Sessions Judge, 2<sup>nd</sup> Court, Serampore, Hooghly allowing Criminal Appeal no. 4 of 2019 and thereby setting aside order dated 18.07.2018 passed by the Ld. Judicial Magistrate, 3<sup>rd</sup> Court, Serampore in Misc. Case No. 103/2014.

The petitioner's case is that the opposite party no. 2 filed an application under Section 12 of The Protection of Women from Domestic Violence Act, 2005 against the petitioner before the learned Additional Chief Judicial Magistrate, Serampore, Hooghly being Miscellaneous Case No. 103 of 2014.

The case was subsequently transferred before the learned Judicial Magistrate, 3<sup>rd</sup> Court, Serampore, Hooghly and the petitioner filed show cause in the said proceeding inter alia on the ground that the case is not maintainable.

The matter was taken up for hearing on 18.07.2018 before the learned Judicial Magistrate, 3<sup>rd</sup> Court, Serampore, Hooghly on the issue regarding maintainability of the case and after hearing the parties the learned Court was pleased to direct that the instant case is not maintainable and stands dismissed on the ground that the instant opposite party no. 2 filed the instant case being a minor and not represented by any of her natural guardian or next friend.

The opposite party no. 2/daughter then filed an appeal under Section 29 of Protection of Women from Domestic Violence Act, 2005 against the said order dated 18.07.2018 before the learned Additional District Judge, First Court, Serampore, Hooghly being Criminal Appeal No. 4 of 2018.

By a judgment and order dated 29.08.2019, the Additional Sessions Judge, 2<sup>nd</sup> Court, Serampore, Hooghly set aside the order dated 18.07.2018 passed in Miscellaneous Case No. 103 of 2014 with a direction for review of the same by the learned Judicial Magistrate, 3<sup>rd</sup> Court, Serampore, Hooghly.

The petitioner/father's case herein is that at the time of filing the application under Section 12 of Protection of Women from Domestic Violence Act, 2005 the opposite party no. 2 was a minor and she was not represented by her natural guardian or next friend and therefore the said application under Section 12 of Protection of Women from Domestic Violence Act, 2005 filed by the opposite party no. 2 is not maintainable in the eye of law.

The petitioner's further case is that the learned Appellate Court failed to consider the settled principle of law that a minor cannot take any legal action without being represented by his/her natural guardian or next friend and erroneously set aside the order passed by the learned Judicial Magistrate, 3<sup>rd</sup> Court, Serampore, Hooghly and therefore the judgment dated 29.08.2019 passed by the learned Additional Sessions Judge, 2<sup>nd</sup> Court, Serampore, Hooghly is not at all tenable in the eye of law and liable to be set aside. The

petitioner has thus prayed for setting aside of the judgment and order under revision.

Affidavit in opposition and reply thereto has been filed, denying each others' case.

Some important dates in this case are as under:-

|   |                                                                                                                                                                                                                             |   |            |
|---|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|------------|
| 1 | Date of Birth of the opposite party/petitioner Ms. Aparajita Ray.                                                                                                                                                           | – | 27.08.1999 |
| 2 | Date of filing case before Ld. A.C.J.M., Serampore, being Misc. Case no. 103 of 2014.                                                                                                                                       | – | 02.04.2014 |
| 3 | Date of becoming a Major (O.P. no. 2/petitioner Aparajita Roy).                                                                                                                                                             | – | 27.08.2017 |
| 4 | Date of final order in Misc. Case no. 103/2014, dismissing the case on the ground that the petitioner Aparajita Roy was a Minor at the time of filing the case and was not represented by her natural guardian/next friend. | – | 18.07.2018 |

**Mr. Sandip Mitra learned lawyer for the petitioner** has prayed for setting aside of the order dated 29.08.2019 in Criminal Appeal No. 4/2018

passed by the Ld. 1<sup>st</sup> Court of Additional District Judge, Serampore, Hooghly. On the ground that the order/judgment is not in accordance with law.

**Mr. Sandip Mitra** has stressed on the point that the order of the Ld. Magistrate was right as the Misc. Case was filed by a minor and thus not maintainable right from its initiation and cannot be considered to be proper and in accordance with law even when the petitioner (in Misc. Case) was a major at the time of final order.

It is further argued that when an application is void ab initio it cannot be considered to be in accordance with law on the happening of a subsequent event (herein the daughter/O.P. no. 2/petitioner becoming a major).

**Mr. Prabir Kumar Mitra, learned lawyer for the opposite party no. 2** has argued that the protection of women from Domestic Violence Act, 2005 is a beneficial and assertive legislation for the welfare of victims of Domestic Violence.

He has relied upon the following rulings:-

- (1) Suryanarayana vs. State of Karnataka (2001) 9 SCC 129.
- (2) AIR 2004 SC 23 – Ratansinh Dalsukhbhai Nayak vs. State of Gujarat.
- (3) (1997) 5 SCC 341 – Dattu Ramrao Sakhare and Ors. vs. State of Maharashtra.

(4) AIR 1969 Orissa 105 (V56C38) Dhansai Sahu and another vs. State of Orissa.

All these judgments relate to child witness.

(5) (2016), SCC (Cri) 810 Krishna Bhattacharjee vs. Sarathi Choudhury and Anr.

(a) This relates to the definition “Aggrieved person” and “continuing offence” under the Act of 2005.

(b) **And also regarding the duty and approach of Court’s before nullifying grievance of aggrieved person on the ground of maintainability.**

(c) **Courts should adopt sensitive approach towards the rights of women under 2005 Act.**

It is further argued by him that the learned Sessions Judge, was sensitive in his approach and rightly held that the legislation being benevolent and the appellant (daughter) therein having become a Major at the time of passing of the trial order by the learned Magistrate (18.07.2018), the Misc. Case was thus maintainable as on 18.07.2018 and the Magistrate erroneously dismissed the Misc. Case and the learned Sessions Judge, rightly set aside the said order of dismissal. Accordingly, this criminal revision should be dismissed.

Heard all the parties at length. Considered the materials on record and the relevant provisions of law. Considered.

Surprisingly, the mother of the opposite party no. 2 (then a minor) and wife of the petitioner did not file the case under the Domestic Violence Act, 2005 before the Ld. Magistrate. The minor daughter did but without her natural guardian or next friend. No logical explanation has come forth from the learned lawyer for the opposite party no. 2 on this point.

A point, where if the mother had filed the case for herself and her minor daughter (O.P. no. 2 herein) all this controversy would not have arisen in the first place.

In ***Raj Behari Lal and Ors. vs. Dr. Mahabir Prasad and Ors. (AIR 1956 All 310)***, the Allahabad High Court discussed several judgment on this point including that of Calcutta High Court. The relevant portion of the judgment is quoted below:-

*“The case of filing an appeal **without guardian** or by a guardian other than the one who was appointed by the Court below, to a certain extent will be analogous to a suit filed by a minor without a next friend.*

*In Order 32, Rule 2 there is a provision which provides that where a suit is instituted by or on behalf of a minor without a next friend the defendant might apply to have the plaint taken off the file and by Clause (2) of Rule 2 notice of such application shall be given to such person and the Court after hearing his objection may make such order in the matter as it thinks fit and in that event the Court can later on appoint a guardian and according to the decisions the suit will be deemed, even in those cases, to have been filed on the date on which it was filed and not on the date on which the guardian was appointed.*

**'Beni Ram Bhutt v. Ram Lal Dhukri', 13 Cal 189 (J)** was a case where the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised as to whether the plaintiffs were minors or not.

The finding of the trial Court was that the plaintiffs were minors and the suit was dismissed. But the learned Judges of the High Court suggested that the procedure should have been to suspend all proceedings and to allow sufficient time to enable the minors to have themselves represented in the suit by a next friend and they held that:

**"even if we were inclined to agree with the lower Court that all the plaintiffs were minors at the time when the suit was instituted, still we should have held that the lower Court was not justified dismissing the suit upon, that ground."**

**Further in that case one of the plaintiffs had attained majority while the suit was pending in the trial Court and the learned Judges held:**

**"But in this case, taking the finding of the lower Court to be correct, yet, at the time when the trial took place, plaintiff I was admittedly of age, and therefore it would have been un-necessary to suspend proceedings in order to allow him to appear by a next friend. In fact being an adult, he was competent to proceed with the suit himself."**

The above case was really once remanded to the High Court and on remand no objection was taken by the respondents on the score of their minority and their Lordships were of opinion that that being so the respondents were precluded from relying upon that objection in the lower Court when the case was remanded to that Court for trial.

If the filing would be a nullity the question of suspension of proceedings and appointment of a

new guardian later on and **the suit becoming a proper suit if during the pendency of the trial the plaintiff attains majority** and the question of precluding the respondents from challenging the decree on that ground would not have arisen.

**‘Rattonbai v. Chabildas Lalloobhoy’, 13 Bom 7 (K)** is another case of this nature where a, suit was filed by the plaintiff without a next friend. It was held that-

"As regards the law of the case, there is no doubt that an infant cannot prosecute an action either in person or by solicitor, but only through an adult person known as "the next friend of the minor." There is no doubt also that if an infant does sue either in person or by solicitor, the defendant may, under Section 442, (Order 32, Rule 2) apply to have the proceedings set aside. The omission 'is not more than an irregularity. It is not a case of nullity'." And they further held that-

"When the fact of minority is a 'bona fide' question of evidence, and the defendant's allegation is found correct, **then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend.**"

In--**‘Pupooth v. Vayisravanath Manakkal Raman’, AIR 1923 Mad 553 (O)** a Bench off that Court held that:

"If on an issue raised and tried in the case, the Court finds that the plaintiff is a minor, it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint. **But if, before the Court decided that the plaintiff was a minor, he had become a major, there is no necessity thereafter to have a next friend for him.**"

The Court further held that the court is the guardian of the minors' interest and cannot allow their interest to suffer by the action of others.

Here, in the present case though admittedly the petitioner in the Misc. Case was a minor on the date of filing (02.04.2014), she became a Major (27.08.2017) on the date of final order (18.07.2018) passed by the Ld. Magistrate. **The petition thus was an irregular one, which was regularized on the date of final order, when the petitioner was a major.** As such the order of the Magistrate dated 18.07.2018 in Misc. Case no. 103/2014 is clearly not in accordance with law and was thus rightly set aside by the Ld. Sessions Judge, also taking into consideration that the relief had been prayed for under an assertive and beneficial legislation.

In ***Krishna Bhattacharjee vs. Sarathi Choudhury and Anr. (2016) 1 SCC (Cri) 810.***

**The Supreme Court held:-**

***“2005 Act is a beneficial and assertive legislation for more effective protection of constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence.”***

The Court further held that the duty and approach of Courts:-

***“Before nullifying grievances of aggrieved person on ground of maintainability, Court should adopt a sensitive approach towards the right of women under 2005 Act.”***

In the case before us, the learned Magistrate clearly failed in his duty and approach as per the guidelines of the Supreme Court and in spite of the petitioner/opposite party no. 2 being a major, on the date of final order, dismissed the Misc. Case 103/2014 on that ground thus causing irreparable loss and injury to the daughter/petitioner/opposite party no. 2 herein. The learned Magistrate also failed to keep in mind that it is the duty of the Courts to protect the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence. **The petition on the date of filing was a mere irregularity and on the petitioner becoming a major, the petition was regularized.** And it happened before the final order was passed by the Magistrate.

Here it is the father, who is the person accused of domestic violence. As such, the learned 1<sup>st</sup> Court of Additional District and Sessions Judge, Serampore rightly allowed the appeal, directing the learned Magistrate to hear the case afresh. The learned Sessions Judge, also kept in mind that the case was under a beneficial legislation and the appellant was clearly/admittedly a major on the date of order.

The judgment under revision is thus in accordance with law.

**Accordingly CRR 2923 of 2019 stands dismissed.**

The learned Magistrate, 3<sup>rd</sup> Court, Serampore is directed to consider the Misc. Case no. 103/2014 afresh in accordance with law and dispose of the case within three (3) months from the date of communication of this order.

Copy of the judgment be sent to the Ld. Additional District and Sessions Judge, 2<sup>nd</sup> Court, Serampore, Hooghly and Ld. Judicial Magistrate, 3<sup>rd</sup> Court, Serampore, Hooghly for information and necessary compliance.

Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

**(Shampa Dutt (Paul), J.)**