

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
MISCELLANEOUS CIVIL APPLICATION NO.295 OF 2022**

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| 1. Siddhesh Ramesh Kadam |] | |
| Age 41 years, Occupation: Business, |] | |
| Having Address at 901, Sheth Residency |] | |
| Gavanpada, Mulund (E), Mumbai - 81. |] | |
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| 2. Ramesh Shankar Kadam |] | |
| Age 80 years, Occupation - Retired |] | |
| Having Address at 901, Sheth Residency |] | |
| Gavanpada, Mulund (E), Mumbai - 81. |] | |
| | | |
| 3. Mrs. Sulbha Ramesh Kadam |] | |
| Age 69 years, Occupation - Housewife, |] | |
| Having Address at 901, Sheth Residency |] | |
| Gavanpada, Mulund (E), Mumbai - 81. |] | |
| | | |
| 4. Mr. Chetan Ramesh Kadam |] | |
| Age 46 years, Occupation - Software Engineer] |] | |
| Presently having address at 2229, |] | |
| Bancroft PL, NW Apt# 203, Washington, |] | |
| D.C - 20008, USA. |] | |
| | | |
| 5. Mrs. Chitra Santosh Parab |] | |
| Aged 48 years, Occupation - Doctor, |] | |
| Presently having address at 80, |] | |
| Shortland Ave, Strathfield, NSW - 2135, |] | |
| Australia |] | Applicants |
| | | |
| Vs. | | |
| Mrs. Megha Siddhesh Kadam |] | |
| Age - 37 years, Occupation - Service, |] | |
| Residing at C/o Mr. Sharad Nigade |] | |
| 2104, Starlake Point, Neptune, Living Point |] | |
| L.B.S. Marg, Bhandup (W), Mumbai - 78. |] | Respondent |

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Mr. Ranvir Shekhawat i/b Raj Legal, for Applicant.
Mr. R.S. Alange, for Respondent.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 10th March, 2023.
PRONOUNCED ON:17th March, 2023.

ORDER:

1. This is an application by the husband and his parents seeking transfer of C.C No.63/DV/2021 preferred under section 12 r/w 23 of the Protection of Women from Domestic Violence Act, 2005 by the respondent/wife from the file of learned Metropolitan Magistrate, 53rd Court at Mulund, Mumbai to the Family Court, Bandra wherein Petition No. A-1644 of 2019 filed by the applicant No.1-husband under section 13 (1) (ia) of the Hindu Marriage Act, 1955 is pending.
2. Heard learned Counsel for the respective parties.
3. In short, it is the contention of the applicants that due to the arrogant behaviour and indifferent attitude of the respondent since inception, the relations are strained to the extent that it is impossible for the applicant No.1 to cohabit with the respondent-wife due to tremendous mental torture inflicted upon him by her. He, therefore, constrained to approach the Family Court by filing Divorce Petition, as above.

4. It is the contention of the applicants that in order to further harass them and also by way of counterblast to the applicant No.1's divorce petition, respondent filed aforesaid case before the learned Metropolitan Magistrate, Mulund under section 12 r/w 23 of the Protection of Women from Domestic Violence Act. It is, thus, contended that issues raised in both the matters are identical and the same are pending at their initial stages. Divorce Petition came to be filed prior in time and after respondent had received summons of the said case, she filed C.C. No.63/DV/2021.

5. As such, it is the contention of the applicants that it will be convenient to all the parties concerned to hear the matter by one Court viz. Family Court, Bandra. It is contended that applicants No.2 and 3 are senior citizens who may have to appear before the Metropolitan Magistrate Court, Mulund in a falsely filed case under Domestic Violence Act.

6. While countering the averments in the application, in her reply, stand of the respondent is that such an application made by the applicants is nothing but an attempt to stall the proceedings before the Metropolitan Magistrate at Mulund. No case for

transfer at all has been made out by the applicants.

7. It is contended that presently the respondent resides with her parents at Usar Budruk, Mangaon, District Raigad. She has lost her job and has no means of income. She is living at the mercy of her parents. She will have to come all the way from Mangaon to Mulund for attending the domestic violence proceedings. There would not be any inconvenience for the applicants to attend the domestic violence proceedings at Mulund as business and office of the applicant No.1 is at Dadar.

8. The law on the point of transfer of cases in matrimonial disputes, especially, under the Domestic Violence Act and under the Family Court's Act is no more *res integra*. Single Judge of this Court (Coram: Smt. Bharati H. Dangre, J.) in case of **Sandip Mrinmoy Chakraboarty Vs. Reshita Sandip Chakrabarty and another**¹, in paragraph Nos. 9 to 15 has observed thus;

"9. The Family Courts Act, 1984 is an Enactment to provide for establishment of the Family Courts with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. The said Enactment was brought into force in the backdrop of

1 Cri. W.P. No.4649 of 2015

the 59th report of the Law Commission, which states that in dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts for its settlement before the commencement of the trial.

Perusal of Act would reveal that Section 7 sets out the jurisdiction of the Family court and provides that subject to the other provisions of the Act, a Family Court shall have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation and be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends. The explanation to the said section enumerates the nature of suits and proceedings and a series of the proceedings have been included, in respect of which the Family Court will exercise its jurisdiction. Sub-section 2 of Section 7 provides that the Family Court shall exercise jurisdiction which is exercisable by a Magistrate of the First Class under Chapter IX and also other jurisdiction conferred on it by and other Enactment. Sub-section (2) reads thus...

"(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order of maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

10. By virtue of sub-section (2) of Section 7, a Family Court is competent to exercise its jurisdiction which is exercisable by a Magistrate of the First Class under Chapter IX (relating to order of maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and it is also competent to exercise such other jurisdiction as may be conferred on it by any other Enactment. Perusal of sub-section 2 (b) would thus reveal that when this Enactment was brought into force, it carved out the jurisdiction of the Family Court in the existing situation by referring to the suits and proceedings which would be subjected to the jurisdiction of the Family Court and covered the proceedings before the learned Magistrate First Class. However apart from nature of the suits and proceedings, the legislature also introduced Clause (b) to sub-section (2) and it kept open the scope for the jurisdiction to be exercised by the Family Court if it is conferred by any other Enactment.

Section 8 was introduced in the Enactment for exclusion of jurisdiction in respect of the pending proceedings where a Family Court has been established for any area so as to confer jurisdiction on the Family Court. Perusal of the Enactment would further reveal that Section 20 gives an overriding effect to the provisions of the Act and it states that the provisions of the Family Courts Act, 1984 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Now provisions of Domestic Violence Act, 2005 needs a brief mention. The Protection of Women from Domestic Violence Act, 2005 is an enactment 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. The said Enactment in the definition part define and assign definite meaning to certain terms which it intends to apply. The term aggrieved person is defined in Section 2 (a) to mean a women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Such a woman can approach the Magistrate by preferring an application under Section 12 of the Enactment. An aggrieved person or protection officer or other person on behalf of the aggrieved person is competent person for seeking one or more reliefs under this Act. What are the reliefs that may be claimed and which learned Magistrate may grant are then set out in Chapter IV and in specific from Section 17 to Section 22 of the said Enactment. In the sequence of these Sections, Section 23 finds a place. The said Section confers power on the Magistrate to pass interim order as he may deems fit, just and proper on the basis of affidavit in such form as may be prescribed, it is prima-facie disclosed that the respondent is committing, or has committed an act of domestic violence or that there is likelihood that such an act may be committed.

11. Reference to Section 26 is also warranted. Section 26 is a special provision contained in the Domestic Violence Act 2005. By virtue of the said

section the relief which is available to an aggrieved person under Section 18, 19, 20, 21 and 22 can also be sought in proceedings instituted before the Civil Court, Family Court or Criminal Court. Section 26 reads thus:-

" Relief in other suits and legal proceedings - (1)

Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in my 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.

(2) 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.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Section 27 determines the "jurisdiction" and jurisdiction to be exercised by the Magistrate depend on the local limits within which the parties are either residing or where the cause of action has arisen. Section 28 provides the "Procedure" to be followed and it is to be noted that all proceedings under Section 12, 18, 19, 20, 21, 22 and 23 and offence under Section 31 shall be governed by the provisions of the Code of Criminal Procedure. Sub-section (2) envisages that the Court may lay down the own procedure for

disposal of application for any relief or for passing ex parte order. The said enactment also contains a provision in form of Section 30 which states that the provisions of the Domestic Violence Act 2005 shall be in addition and not in derogation of the provisions of any other law, for the time being in force.

12. On having bird's eye view of the two Enactments, it is apparent that the two Enactments provide for overriding remedies and reliefs. The forum of Family Court established under Section 3 of the Family Courts Act, 1984 is competent to exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings referred to in the explanation appended to Section 7 and for the purpose of exercising such jurisdiction under such law, is deemed to be a district Court, or, as the case may be, subordinate civil Court for the area to which the jurisdiction of Family Court extends. The suits and proceedings amenable the jurisdiction of the Family Court are the suits and proceedings between the parties to a marriage for a decree of nullity, or for restitution of conjugal rights or for judicial separation or dissolution of marriage. The Family Court would also exercise its jurisdiction over the property of the parties to a marriage, injunction for circumstances arising out of marital relationship, declaration as to legitimacy of any person, proceedings for maintenance, guardianship, custody of children, access of children etc. The Family Court thus exercises the powers of a civil Court and by virtue of Section 10 of the said Act, it is deemed to be a civil Court and has all the powers of such a Court. By sub-section (1) of Section 10 of the Family Courts Act, 1984, the provisions of the Code of Civil Procedure is made

applicable to the suits and proceedings before the Family Court except the proceedings under Chapter IX of Criminal Procedure Code, 1973, which continue to be governed by the provisions of Code of Criminal Procedure, 1973.

As far as the conduct of proceedings under the Domestic Violence Act, 2005 is concerned, the proceedings are initiated on an application being preferred by an aggrieved person or a protection officer or any other person on behalf of the aggrieved person seeking various types of reliefs which the Magistrate is competent to grant under Chapter IX. Section 28 prescribes that all the proceedings under Section 12, 18, 19, 20, 21, 22 and 23 are governed by the Code of Criminal Procedure, 1973. It is, however, permissible for the Court to lay down its own procedure for disposal of an application under Section 12 or under sub-section 2 of Section 23. Since the Code of Criminal Procedure do not contain any provision to grant ex-parte and interim orders, the legislature deemed it fit and expedient to introduce Section 23 and confer the Magistrate with the specific power to pass such interim order as he deems fit and proper. The Family Court which exercises the jurisdiction of a Civil Court which is deemed to be a Civil Court, would exercise all the powers of a Civil Court and it is needless to say that it would include the power to grant injunction or any interim orders of any nature by virtue of Order XXXIX Rules 1 and 2. It is also empowered to pass interlocutory orders so as to protect the subject matter of the proceedings. Thus, the Family Court which is deemed to be a civil Court possesses all the powers of a civil Court including its inherent power to grant interim relief, and therefore, a Section analogous to Section 23 of the Domestic

Violence Act, 2005 do not find place in the Family Courts Act, 1984.

13. Coming to the present controversy which this Court is called upon to deal with viz. relief that is sought for transfer of proceedings pending on the file of the learned Judicial Magistrate First Class at Cantonment Court, Pune to the Family Court at Pune, the apprehension expressed by the learned counsel for the respondents that the Family Court is not clothed with the powers as the one which is conferred on the Magistrate under Section 23 of the Domestic Violence Act, 2005 is misconceived and since it is already noted above that the Family Court which acts as Civil Court and since it is vested with all powers of Civil Court which includes specific provision to pass interim orders, the said apprehension can be dispelled and it is to be noted that the Family Court is competent not only to deal with the application preferred under Section 12 and specifically in the light of the powers conferred by Section 26 of the Domestic Violence Act, 2005 the relief available under Section 18, 19, 20, 21 and 22 can be sought in proceeding before the Family Court which would include a power to grant interim and ex-parte orders.

14. A perusal of the proceeding involved in this *lis* would reveal that no doubt there are certain distinct reliefs claimed in two proceedings. It is not the case of the learned counsel for the petitioner to curb the progress of the proceedings or to curtail some of the reliefs, which are sought by the respondents. It is his submission that these two proceedings, in order to avoid decision which will adversely affect either of the parties, could be clubbed together and dealt with by the same Court and it is for the Family Court which is

empowered to deal with the said proceedings in the manner which would serve the interest of justice and the interest of parties in a better manner. The prayer of the learned counsel for the petitioner is not to deprive the petitioner of any of the reliefs which she has sought in the Domestic Violence proceedings, but his only claim is that it can be decided before the Family Court effectively and since both the proceedings are instituted by the wife, the Family Court may direct the parties to lead common evidence in support of the overlapping reliefs which are sought and it is always open for the Family Court to deal with the other issues independently.

15. I find sufficient substance in the said contention of the learned counsel for the petitioner and in the backdrop of the scheme of Enactments which has been discussed above, there is no iota of doubt in my mind that the reliefs sought before the learned Magistrate in the Domestic Violence proceedings can be effectively tried and granted by the Family Court. Further it is settled position of law that the Court which is competent to grant a final relief is also competent to grant an interim relief so as to protect the subject matter of the proceedings before it".

9. The said view has also been fortified by another judgment of this Court (Coram: S.C. Gupte, J.) in case of **Santosh Mahindra Mulik Vs. Mohini Mithu Choudhari**² as well as in the case of **Hitesh Prakashmalji Mehta Vs. Aashika Hitesh Mehta**³ (Coram: C.V. Bhadang, J.) and also in the case of **Vijay Suryakant Kakade Vs.**

² Misc. Civil Application No.64 of 2019

³ Mis. Civil Application (St.) No.788 of 2020

Anushka Vijay Kakade and others and Jay Suryakant Kakade Vs. Anunaya Jay Kakade and others⁴ (Coram: Amit Borkar, J.). Consistent views of various single Judges of this Court that the proceedings under the Domestic Violence Act can be transferred to the Family Court need to be followed as the point has already been settled.

10. Since the applicant Nos. 2 and 3 are senior citizens and also in view of the fact that the applicants have already approached the Family Court by filing a Divorce Petition, it would be just and proper to transfer the Domestic Violence proceedings to the Family Court, Bandra in view of the view taken by single Judges as above.

11. As such, application deserves to be allowed. C.C. No.63/DV/2021 pending before 53rd Court of Metropolitan Magistrate at Mulund, Mumbai be transferred to Family Court, Bandra. Family Court, Bandra is directed to decide and dispose of both the Petitions, as expeditiously as possible.

12. Application stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]

⁴ Misc. Civil Appln. No.500 of 2022