

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2403 OF 2018

Mohd.Saeed Khan Mohd. Raees Khan .. Petitioner

Versus

Afsana d/o Late Waris Ali Khan & Anr. .. Respondents

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Mr.Mangesh Patel for the Petitioner.

Mr.Sandesh B. Manikhedkar for the Respondent No.1

Mr.Y.M.Nakhawa, A.P.P. for the State.

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CORAM: BHARATI DANGRE, J.

DATED : 02nd MAY, 2023

P.C:-

1. The petition is filed by the petitioner-husband praying for quashing and setting aside of the order passed by the Additional Sessions Judge in an Appeal, thereby reversing the order passed by the Metropolitan Magistrate, 51st Court, Kurla, Mumbai on 03/05/2017.

Under the impugned order, the Appellate Court has held that wife is entitled for maintenance of Rs.5,000/- per month from the husband from the date of the application i.e. 07/12/2016 and the husband is restrained from causing any domestic violence to her in any manner.

2. Heard the learned counsel for the petitioner and the learned counsel for the respondent.

The background facts would reveal that the wife had filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, "**Act of 2005**"), seeking various reliefs under Sections 18 to 22.

The reliefs were sought in the background that the marriage of the applicant was solemnized with respondent No.1 on 14/02/2016 and respondent Nos.2 to 4 are the uncles of respondent No.1, whereas respondent Nos.5 and 6 are her in-laws. The application also impleaded the sisters-in-law as respondent Nos.7 to 12.

3. For establishing the reliefs claimed in the application, the applicant/wife filed her evidence affidavit and was subjected to extensive cross-examination.

In order to be entitled for the relief, it was necessary to prove that she was subjected to domestic violence and, therefore, the Magistrate framed the point as to whether she was subjected to domestic violence by the respondents.

Clearly feeling the nub of the special legislation i.e. The Protection of Women from Domestic Violence Act, 2005, the Magistrate appreciated the evidence adduced by her as well as her cross-examination at the instance of the respondent/husband. In support, her brother had also filed an affidavit and was subjected to cross-examination. As against this, respondent No.1 also filed his evidence affidavit alongwith evidence of Mohd.Abid.

4. Based on the evidence that had surfaced before him, the Magistrate proceeded to analyse, whether there was any

domestic violence as contemplated under Section 3 of the Act of 2005. Based on the admissions given in the cross-examination, where she had stated that she was never beaten by her husband and that she was not ready to return to her matrimonial home, it is construed as negation on her part to cohabit with respondent No.1.

On the basis of the evidence placed before him, the learned Magistrate clearly recorded as under :-

“25] Respondent no.5 to 12 are residing at U.P. Therefore, I do not see and satisfied that applicant is in need of any kind of protection under the P.W.D.V.Act. Hence, I hold that applicant failed to prove that she has subjected with domestic violence. Hence, I answered Point no.1 in negative.”

As a result of the aforesaid observation, the application was rejected and the proceeding is closed.

5. Being aggrieved, an Appeal was instituted before the Additional Sessions Judge and without appreciating, whether there was sufficient evidence to establish that there was domestic violence, the learned Judge recorded the contention that she was not allowed to meet her parents and the Court recorded as under :-

“It is true that there are no serious allegations and events to hold that there was Domestic Violence in the form of physical abuse at the native place.”

6. After reproducing Section 3, which enumerate as to what would constitute “Domestic Violence”, the learned Judge has proceeded to record that mere physical and mental abuse do not constitute domestic violence, but injury or harm to the well being

of the aggrieved person is also a domestic violence.

It is further recorded that it is seen from the evidence of the applicant that she was not willing to stay in the native place of respondent No.1 and the contention that she was happily staying there, does not seem to be believable and this was construed to be a mental harassment.

7. Perusal of the order passed by the Appellate Court would clearly reveal the misapplication of provisions of the Act of 2005. Section 3 of the Act of 2005 provide definition for the term 'domestic violence' and it contemplate specific act of physical abuse, sexual abuse, verbal abuse, emotional abuse as well as economic abuse and by providing an extensive definition, it is specified that for the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it harms or injures or endangers the aggrieved person or has the effect of threatening the aggrieved person or otherwise injures or causes harm, whether physical or mental to the aggrieved person.

8. In the backdrop of the above provision, when the cross-examination of the applicant is closely perused, it reveal that the applicant has admitted that she resided with respondent No.1 at Kurla for 3 days and, thereafter she had stayed at U.P., where she remained from February to July 2016, whereas respondent No.1 returned to Mumbai on 13/03/2016. She admitted that she continued to reside with other respondents. It is specifically admitted by her that respondent Nos.2 to 4 were not residing with her at Kurla and U.P., but they used to make telephone calls.

In the cross-examination, she has admitted that her husband has nine sisters, three of whom are already married.

She also gave an admission that respondent No.1 did not beat her, but she has deposed that he told others to beat her. She also admitted that she came to Mumbai in the month of August 2016 with her mother and she is not ready to go with respondent No.1, even though he is ready to take her. She also categorically deposed that she is not ready to reside with respondent No.1, though he is ready to take separate residence for her and willing to reside with her.

9. In the wake of the above admissions, the ingredients of Section 3 are not made out at all and the evidence on record has been rightly appreciated by the Magistrate. However, the Appellate Court i.e. the Additional Sessions Judge, while passing the impugned order on 12/04/2018, has clearly misconstrued the provisions of the Act of 2005 and has wrongly applied the same to the facts before him, when ingredients of Section 3 are not made out at all.

In the wake of the above, the impugned order reversing the order passed by the Magistrate cannot be sustained as it suffers from grave perversity. Resultantly, it is quashed and set aside, by restoring the order of the learned Magistrate.

The writ petition stands allowed in the aforesaid terms.

(SMT. BHARATI DANGRE, J.)