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

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Reserved on: 01.05.2023

Pronounced on: 08.05.2023

+ CRL.REV.P.480/2023, CRL.M.A.11424/2023 & CRL.M.A.
11579/2023

‘X’ & ‘Y’

..... Petitioners

Through: Mr. Prosenjeet Banerjee, Ms.
Shreya Singhal, Ms. Pranaya
Sahay and Ms. Sudeshna
Singh, Advocates along with
petitioners

versus

‘Z’

.... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition under Section 397 read with Section 482 of the Code of Criminal Procedure, 1973 has been filed by the petitioners seeking setting aside of order dated 17.02.2023 passed by learned Additional Sessions Judge, South District, Saket Courts, New Delhi in CA No. 24 of 2023 titled “X & Y v. Z” (*name withheld*) and order dated 18.11.2022 passed by learned Magistrate in CC No. 39262 of 2019.

2. Vide an urgent application seeking ex-parte production and preservation of the documents, the petitioner no. 1 has sought the production and preservation of following records:

“a. Guest Register maintained by Post Card Hotel- Cuelim in respect of the Hotel stay of ‘Z’ (*name withheld*) and any other person along with him along with all annexures/documents required from the guests including and not limited to Copy of ID proofs, Covid-19 vaccination certificate, etc. of the guests retained by the Post Card Hotel- both physical as well as electronic documents/data.

b. Invoices issued by Post Card Hotel in respect of the hotel stay of ‘Z’ (*name withheld*) and other guests with him including of the room charge and other ancillary charges such as room service, activities, excursions, dining charges at the hotel restaurant and any other additional services availed during the stay-both physical documents as well as electronic documents/data.

c. Payment details of the accommodation and mode of payment for the same-both physical documents as well as electronic documents/data.

d. Emails exchanged between the Post Card Hotel and ‘Z’ (*name withheld*) and between the Post Card Hotel and another guest in respect of the booking that includes ‘Z’ (*name withheld*)-both physical documents as well as electronic documents/ data.

e. CCTV footage of the check-in/check-out area, if available.

f. Phone records along with CDR of the Respondent (mobile phone number +91 98*****31) (*number withheld in this order*) for the past 3 years, i.e., for the period between 27.10.2019 to 27.10.2022, call records of the with tower proximity...”

3. Brief facts leading to filing of the present petition and the urgent application seeking above-mentioned reliefs are that the petitioner no.1 and respondent were married on 15.04.2012 as per Hindu rites and

customs. During the course of marriage, disputes arose to the extent that allegations were levelled by the petitioner against the respondent and it is alleged that the respondent abandoned the marriage of the petitioner in May, 2017. However, since parties could not reconcile their differences, the petitioner no.1 had filed a complaint under Section 12 of Protection of Women from Domestic Violence Act, 2005 ('DV Act') on 21.11.2019 against the respondent seeking protection orders under Sections 18, 19, 20, 21 and 22 of the DV Act wherein pleadings are complete and case is listed for arguments for grant of interim relief sought by the petitioner no.1. Petitioner no.1 also filed a petition seeking divorce on the grounds of cruelty and depression. It is stated that in July, 2021, petitioner no.1 had discovered an old phone and chats exchanged between the respondent and one Ms. 'X' relating back to the period when the parties were newly wedded. Thereafter, she filed another petition for divorce on ground of adultery under Section 13(1)(1) of Hindu Marriage Act in December, 2021 which is pending before the learned Family Court, New Delhi. It is stated that the petitioner discovered this extra marital affair after ten years of marriage, and she filed evidence of respondent's lack of marital fidelity alongwith additional affidavit dated 22.12.2021 before the learned Magistrate as it constituted domestic violence. It is stated that the petitioner no.1 had come to know that the respondent had stayed with another women at Postcard Hotel-Ceulim, T.B. Cunha Road, House No.64, Cansaulim, Goa around 15.08.2020 to 20.08.2020. On 10.11.2022, she moved an application seeking call detail records of the respondent's mobile phone number with tower proximity for a period

between 27.10.2019 to 27.10.2022. On 18.11.2022, the learned Magistrate had dismissed the application under Order XI Rule 12 and 14 of the Civil Procedure Code on the ground that notice of the same has to be served to the respondent to decide this application. The order was challenged before learned ASJ who *vide* order dated 17.02.2023 dismissed the appeal.

4. It is now argued that the Courts below had committed an error in dismissing the application for preservation and production of the relevant evidence on hyper-technical grounds in arbitrary manner and contrary to settled principles of law. It is also argued that the relevant evidence may be destroyed with time and if the evidence is lost, it will amount to miscarriage of justice. It is also stated that the courts below have denied such request and has termed it as arm twisting and collecting evidence. It is also stated that learned ASJ supplied his own reasons for dismissal which are legally untenable as it held that the application was not maintainable before the learned Magistrate. It is stated that the learned ASJ has taken a hyper technical view while dismissing the application which is contrary to settled principles of law. Learned counsel points out that under Section 28 of D.V. Act, the Court can devise its own procedure in order to do justice between the parties and since the proceeding under DV Act are quasi civil in nature, the provisions of both CPC and Cr.P.C., 1973 can be invoked. It is therefore stated that since the learned ASJ did not deal with ground of challenge raised before him effectively and has sidestepped the issue at hand, the order be set aside. It is also argued that the relief sought in the application can be sought on an ex-parte basis only and if notice is

issued to the respondent, the evidence may be destroyed. It is stated that the learned Magistrate could have formulated its own procedure under Section 28 of DV Act to reach just decision of the case. It is stated that the learned Magistrate failed to appreciate that an application seeking production and discovery under Order XI of CPC can be filed at any stage during pendency of the suit. In this regard, my attention has been drawn to the case of *Union of India v. Imbrahim Uddin* (2012) 8 SCC 148. It is stated that the petitioner has no objection if notice of the application is issued to the respondent however, in the interregnum while the application is being decided by the learned Magistrate, the custodian of the documentary evidence being a third party be directed to preserve the same by an ex-parte order so that the same be not destroyed or tampered with, rendering the application infructuous. It is stated that it is crucial since the custodian of such documents is not a party before the *lis* and there is a high possibility that the documentary evidence may be lost or tampered with. Petitioner states that she does not wish to cast aspersions against anyone and the application has been moved out of caution so that the documents are preserved for scrutiny in the interest of justice and the original documentary evidence is produced as such without tempering. It is also argued that the learned MM has incorrectly held that the relief sought by the petitioner is on a mere apprehension. It is stated that it is not mere apprehension of the petitioner but only after the petitioner had come to know the name of hotel and duration of the stay etc. that she had moved this application.

5. I have heard arguments addressed by learned counsel for petitioners and have gone through the material on record.

6. Section 28(2) of the Protection of Women from Domestic Violence Act, 2005 provides as under:

“...(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.”

7. The learned ASJ while dismissing the application filed by petitioner herein, *vide* order dated 17.02.2023, had observed as under:

“6. After hearing the arguments and considering the submissions, Ld. Trial Court dismissed the said application *vide* impugned order. Relevant portion thereof is being reproduced below for ready reference:-

*"The complainant has merely stated that she has come to know about respondents stay, however, she has not disclosed the source of information. More so, mere apprehensions on part of the complainant/applicant cannot be considered a ground for preserving the above records without intimation to the opposite party. It appears that *vide* the present application, the applicant/complainant is trying to arm twist the Court to collect the evidence on her behalf against the respondent. The present matter is pending at the stage of interim arguments and not even at the stage of evidence. In view thereof, the Court is not inclined to allow the present application and grant the relief as prayed for. Application is accordingly disposed of"*

7. The application before Ld. Trial Court was filed under Order XI Rules 12 and 14 of CPC. Order XI Rule 12 CPC provides as under:-

12. Application for discovery of documents.- Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application. The Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at

that stage of the suit, or make st.ch order, either generally or limited to certain classes of documents, as may in its discretion be though fit:

Provided that discovery shall not be ordered when and so far as the Court shall be opinion that ll is not necessary either for disposing fairly of the suit or for saving costs.

8. Order XI Rule 14 provides as under:

14. Production of documents. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal w:th such documents, when produced, in such manner as shall appear

9. Perusal of above reveals that these two rules are applicable to parties to a suit and not to third persons. In other words, one party to a suit can make an application seeking discovery/production of documents from the other party to the suit. In this case admittedly apart from the appellants herein, only 'Z' (*name withheld*) (respondent) is a party to the proceedings before Ld. Trial Court. The relief of discovery/production of documents is being sought not from 'Z' (*name withheld*) but from a hotel named Postcard-Cuelim situated in Goa. That hotel is not a party to the proceedings, so in these circumstances, this Court is unable to see as to how the relief pertaining to preservation and production of record in question could have been sought under Order XI Rule 12 and 14 of CPC from it. Accordingly, it is held that the application filed before Ld. Magistrate was not maintainable in law and same has been rightly dismissed by way of impugned order albeit for different reasons As the relief sought could not have been granted under application moved on behalf of appellant, this Court is refraining from dealing with the grounds taken by appellants before this Court to challenge the impugned order as that will not serve any purpose..."

8. During the course of arguments, to contend that proceedings under the DV Act are quasi civil in nature and that in certain

circumstances, provisions of Civil Procedure Code, 1908 can apply in such cases, learned counsel for petitioner had placed reliance on the decision of ***Kunapareddy v. Kunapareddy Swarna Kumari*** (2016) 11 SCC 774 whereby no infirmity was found in an order allowing amendments under Order VI Rule 16 of CPC. Some of the relevant observations of Hon'ble Apex Court are as under:

“12. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality...”

9. As far as admissibility of relevant evidence in matrimonial cases is concerned, reliance was placed by learned counsel for petitioner on ***Deepti Kapur v. Kunal Julka*** 2020 SCC OnLine Del 672 whereby a Co-ordinate Bench of this Court had opined as under:

“36. The sequitur to the aforesaid constitutional and legal landscape is that:

(a) The settled rule, purely from the standpoint of the law of evidence, is that evidence is admissible so long as it is relevant, regardless of how it is collected. Digressing from this settled position would have wide ramifications and consequences; and would be a serious hindrance to judicial

proceedings across the board, in several foreseeable and unforeseeable ways. On the other hand, the possible misuse of this rule of evidence, particularly in the context of the right to privacy, can be addressed by prudent exercise of judicial discretion by a court not at the time of receiving evidence but at the time of using evidence at the stage of adjudication;

(b) Merely admitting evidence on the record is not proof of a fact-in-issue or a relevant fact; admitting evidence is not even reliance by the court on such evidence; admitting evidence is mere inclusion of evidence in the record, to be assessed on a comprehensive set of factors, parameters and aspects, in the discretion of the court;

(c) The limited threshold test of ‘relevance’ ensures that the right of a party to bring evidence to court, and thereby to a fair trial, is not defeated. What weight is to be given to evidence so brought-in, and whether or not the court ultimately relies upon such evidence for proof of a fact-in-issue or a relevant fact, is always in the discretion of the court. This, a court may do on other considerations, including considerations of justice and fair play. We must be clear that the test of admissibility is only a ‘threshold test’, which opens the doors of the court, as it were, so that relevant evidence brought by a litigating party is permitted entry into the court records. It does not bind the court to treat such evidence as proof of a fact-in-issue or relevant fact. Section 14 of the Family Courts Act makes this threshold test even less stringent, in that the Family Court may receive evidence, whether or not it would otherwise be relevant or admissible under the Evidence Act, provided in its opinion such evidence would assist it in effectively dealing with the dispute...”

10. Learned counsel for petitioner had also argued that under similar circumstances, Hon’ble High Court of Kerala in ***Radeena DN v. Rahul K 2020 SCC OnLine Ker 20535*** had allowed an application seeking production of phone records of opposite party where adultery was in question, with the following observations:

“...Coming to the facts of the case, the allegation of the husband is that the wife had been indulging in adulterous relationship and that amounted to cruelty also. If the husband wants to make out a case of adultery or cruelty from telephone conversations, conduct and other behavioral patterns, it would not be in the interest of justice to prevent such evidence being brought before the Family Court. The telephonic call details and the mobile tower details are matters of evidence which the husband intends to adduce in his attempt to prove his allegations. Whether or not the said evidence have a bearing is not for the Court to consider at this juncture. A document in the possession of another person can be brought in evidence by recourse to the provisions contained in Order 16 of the CPC. When such a procedure has been availed of by the husband, it cannot be said that the summoning of a document is perverse or illegal...”

11. It was also argued that where production of documents such as hotel records were sought in order to establish a claim for adultery, Hon’ble High Court of Telangana in ***K. Srinivasa Rao v. N. Naga Kamala Rani Civil Revision Petition No. 2385/2018*** had allowed the same by expressing as under:

“...Further, when the petitioner-husband specifically sought divorce on the ground of adultery, the subject documents may be crucial to establish the alleged adulterous relationship between the first respondent-wife and the second respondent. Though photocopies seem to have been procured by the petitioner- husband of some of the incriminating documents, the original record summoned from the hotels concerned would be important primary evidence. Therefore, the learned Family Court Judge ought not to have brushed aside the plea of the petitioner-husband for summoning of these documents despite his power to do so under Order 16 Rule 6 CPC...”

12. In the present case, the record which is sought to be produced and preserved are pursuant to certain allegations which have been levelled against her spouse on the ground of adultery. At this stage the complainant/petitioner is not asking for the supply of those documents to herself or the documents being filed before the Court for the purpose of adjudication. The plea before this Court as well as the learned Trial Court was only to direct the third parties who are in possession of such crucial evidence, which the petitioner herself will not be in position to lay her hands on without assistance of the Court, to be preserved so that by the time the trial reaches the appropriate stage of production of evidence, the same are not destroyed. This Court therefore, in the facts and circumstances of the case, directs the preservation of following records:

- a. Guest Register maintained by Post Card Hotel-Cuelim in respect of the Hotel stay of 'Z' (*name withheld*) and any other person along with him along with all annexures/documents required from the guests including and not limited to Copy of ID proofs, Covid-19 vaccination certificate, etc. of the guests retained by the Post Card Hotel- both physical as well as electronic documents/data.
- b. Invoices issued by Post Card Hotel in respect of the hotel stay of 'Z' (*name withheld*) and other guests with him including of the room charge and other ancillary charges such as room service, activities, excursions, dining charges at the hotel restaurant and any other additional services availed during

- the stay-both physical documents as well as electronic documents/data.
- c. Payment details of the accommodation and mode of payment for the same-both physical documents as well as electronic documents/data.
 - d. Emails exchanged between the Post Card Hotel and 'Z' (*name withheld*) and between the Post Card Hotel and another guest in respect of the booking that includes 'Z' (*name withheld*) both physical documents as well as electronic documents/ data.
 - e. CCTV footage of the check-in/check-out area, if available.
 - f. Phone records along with CDR of the Respondent (mobile phone number +91 98*****31) (*number withheld in this order*) for the past 3 years, i.e., for the period between 27.10.2019 to 27.10.2022, with tower proximity.
13. **However, it is clarified that the records will not be handed over to any of the parties but will be preserved by the concerned persons/authorities and will be produced before the concerned Courts only in case they are directed to do so at the appropriate stage of trial. This Court makes it clear that this order is being passed only for the purpose of preservation of the record so that the same is not tampered or destroyed with passage of time when the appropriate stage of trial reaches and in case the learned Trial Court comes to a conclusion that the same can be produced in the Court by either of the parties, this order will not be construed to have conferred any right to them to do so. This Court also is not**

giving any finding on the genuineness or anything related to the record being used as evidence or its evidentiary value before the concerned Court of law. The concerned Court will issue notice of the application moved by the concerned parties for production of these documents and record in the Trial Court for any purpose and after hearing the other side. The Court will decide the application for production of such documents on its merits as per law.

14. Considering the sensitive nature of the present case, the Registry is directed to mask the names of petitioner no. 1 as 'X', petitioner no. 2 as 'Y' and respondent as 'Z' in the records of the case.

15. A copy of this judgment be forwarded to the concerned Trial Court for ensuring compliance of the order. Since phone numbers and the names of the parties have been masked/withheld in this judgment, the original prayer of this application will be annexed and sent to the concerned authorities/persons by the learned Trial Court to ensure effective compliance.

16. Accordingly, the present petition, alongwith pending applications, stands disposed of in above terms.

17. The judgment be uploaded on the website forthwith

SWARANA KANTA SHARMA, J

MAY 8, 2023/ns