



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

**WRIT PETITION NO.3033 OF 2023**

Shamim Hasan Hunerkar

...Petitioner

**Versus**

Ayashbi Suleman Hunerkar And Anr

...Respondents.

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*Adv. Sumit Kothari for the Petitioner.*

*Adv. Prakash Jain for the Respondents.*

*Adv. Shilpa Gajare, APP for the Respondent-State.*

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**Coram : Sharmila U. Deshmukh, J.**

**Date : April 17, 2024.**

**P. C. :**

1. Heard.
2. By this Petition the challenge is to the order dated 11<sup>th</sup> July, 2023 passed by the Appellate Court in Criminal Appeal No. 6 of 2022 filed by the Respondents against the order of the Trial Court dated 25<sup>th</sup> April, 2022 passing residence orders in favour of the Petitioner restraining the Respondents from causing any obstruction to the residence of the Petitioner in the shared household being house No. 594.
3. The facts of the case are that the Petitioner is the wife of one Hassan who is the son of Respondent No. 1 and the brother-in-law of

Respondent no. 2. The marriage between the parties had taken place in the year 1982 and in the year 1986 and 1991 two daughters are born of said marriage. It was contended in the Application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 ( D. V. Act) that the Petitioner was driven out of the matrimonial house and was residing in the rented house. It was contended that in 1997 her husband expired and there was no source of income and consequently, in the year 1997, she came back to reside in the shared household. It was contended that one of the daughters of the Petitioner is married to the son of her husband's brother. In the D. V. Application it was contended that after the demise of her husband, the Respondent No. 1 mother-in-law would constantly abuse the Petitioners and cause harassment. It was contended that in the year 2019 the Petitioner had gone for a visit to her parents house and when she tried to enter the shared household she was not permitted.

**4.** With such allegations the D. V. Application was filed in the year 2019 itself under Section 12 of the D. V. Act seeking various reliefs including specific relief of right of residence in the shared household. By way of an interim application under Section 23 of the D. V. Act, interim relief of residence and maintenance was sought which was partly allowed by the Trial Court. By order dated 25<sup>th</sup> April, 2022, the

Trial Court granted residence orders, however, declined to grant the maintenance.

**5.** As against this Appeal came to be filed by the Respondents. The Appellate Court held that the Petitioner will have to establish her right by leading evidence as regards the joint family property and then show having a right to reside in the portion of the property. As far as the shared household is concerned, the Appellate Court held that as the Petitioner claimed to be staying separately with her husband in a rented house unless the house is to be shown to be shared household the Petitioner cannot take benefit of the provisions of D. V. Act and allowed the Appeal reversing the order of the Trial Court dated 25<sup>th</sup> April, 2022.

**6.** Heard Mr. Kothari, learned counsel for the Petitioner and Mr.Jain, learned counsel for the Respondent.

**7.** Learned counsel for the Petitioner would submit that the relationship inter-se is not disputed and as such there is a subsisting relationship by reason of marriage of the Petitioner with the son of Respondent No.1. He would further submit that the provisions of the D. V. Act entitles the aggrieved person a right of residence in the shared household irrespective of whether the Petitioner was actually

residing in the shared household at the time of filing of the Application. He submits that the position has been made clear by the Apex Court in the case of ***Prabha Tyagi vs. Kamlesh Devi [(2022) 8 SCC 90]***. He submits that the facts of that case are identical as to the present case as in that case also the husband of the aggrieved person had expired and the right to reside in the shared household was denied to the aggrieved person therein. He submits that the premises is of two storey building consisting of six rooms in the ground floor and three rooms on the first floor. He submits that it is only in 2019 when the Petitioner had gone to her parents house that she has been obstructed from residing in the shared household.

8. *Per contra*, learned counsel appearing for the Respondents would submit that the Appellate Court has rightly considered that the issue will require evidence to be led. He submits that it is specific contention of the Petitioner that her husband has expired on 30<sup>th</sup> October, 1997 and that she was residing in a rented house. He submits that as such, evidence will have to be led and the decision of the ***Prabha Tyagi vs. Kamlesh Devi*** (supra) will not be applicable as the same was rendered after the evidence was led and dispute was adjudicated.

9. Considered the submissions and perused the record.

**10.** The relationship inter-se between the parties is not disputed and as such, there is subsisting domestic relationship between the parties. The provisions of Section 23 of the D. V. Act empowers the Magistrate to grant ex-parte interim orders under Section 18, 19, 20, 21 or as the case may be under Section 22 against the Respondents. In the present case, the Petitioner is claiming a right to reside in the shared household where she was residing after her marriage. Although subsequently, she was residing separately in a rented house, the said position will not take away the right of Petitioner under Section 17 of the D. V. Act especially when it is pleaded that in the year 1997 Petitioner had come back to the shared household and was residing therein. Even if at the time when the application was filed, the Petitioner was not actually residing in the shared household, the position in law has been settled by the Apex Court in the case of ***Prabha Tyagi vs. Kamlesh Devi*** (surpa). In that case the aggrieved person was not actually residing in the shared household and was residing with her husband elsewhere and the Apex Court considered the right of the aggrieved person under Section 17 of the D. V. Act to reside in the shared household. The Apex Court considered the issue as to whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been leveled at the point of commission of violence.

**11.** The Apex Court held that if a women has right to reside in the shared household under Section 17 of the D. V. Act. She can seek relief under the provisions of D. V. Act including enforcement of a right to live in the shared household. In the present case, it is pleaded that after the marriage, the parties resided in the said house and as such, the same constitutes shared household within the meaning of Section 2(s) of the D. V. Act. The issue as to whether evidence is required to be led will not come in the way of passing of interim relief in view of Section 23 of the D. V. Act. If the aggrieved person has a right to reside in the shared household. The Magistrate has ample powers to pass interim orders to restrain the Respondents from obstructing the right of residence of the aggrieved person.

**12.** The Appellate Court while reversing the findings of the Trial Court has not correctly appreciated Section 2(s) of the D. V. Act, which defines shared household. The Appellate Court was also not right in holding that because the Applicant was residing separately with her husband in the rented house, the house where the parties resided after the marriage would not constitute a shared household. The said decision has been rendered in ignorance of the decision of the Apex Court in the case of ***Prabha Tyagi vs. Kamlesh Devi*** (supra) and therefore the findings of the Appellate Court are clearly

unsustainable.

**13.** Resultantly, the impugned order 11<sup>th</sup> July, 2023 is hereby quashed and set aside. Consequently, the order of the Trial Court dated 25<sup>th</sup> April, 2022 is revived. Petition succeeds and stands allowed.

**[Sharmila U. Deshmukh, J.]**

Harish

Signed by: Harish V. Chaudhari

Designation: PA To Honourable Judge

Date: 20/04/2024 16:41:18