

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO.290 OF 2018

Gajanan S/o Parashram Rathod,
Age 36 years, Occu. Agri.
R/o Palsona, Tq. & Dist. Hingoli.

... Applicant.

Versus

Surekha Gajanan Rathod,
Age 30 years, Occu. Household,
R/o Palsona Tanda,
Taluka and District Hingoli,
At present residing at Kathoda Tanda,
Tq. Aundha Nagnath,
District Hingoli.

... Respondent.

...
Advocate for Applicant : Mr. Sachin S. Deshmukh.
Advocate for Respondent : Mr. Amol B. Chalak.
...

CORAM : S. G. MEHARE, J.

RESERVED ON : 06.12.2022.

PRONOUNCED ON : 24.01.2023.

JUDGMENT :-

1. Rule. Rule made returnable forthwith and heard finally by consent of the parties.

2. The applicant/husband has preferred this criminal revision application against the order of the learned Additional Sessions Judge, Basmathnagar passed in Criminal Appeal No.3 of 2014, dated 26.07.2018.

3. The 'petitioner' would be referred to as the 'respondent' and the 'respondent' would be referred to as the 'applicant' hereinafter.

4. The applicant got married respondent on 09.05.2007. However, their marital relations turned bitter. Therefore, a customary divorce was executed on 01.02.2012, accepting the lumpsum alimony of Rs.1,75,000/-. Then, the respondent/husband filed a divorce petition on 17.04.2012 on the ground of cruelty. The petitioner/wife filed an application under the Protection of Women from Domestic Violence Act, 2005 (for short "D.V. Act"), before the learned Judicial Magistrate First Class, Aundha Nagnath, on 14.08.2012, i.e. after the divorce petition of respondent. The learned Judicial Magistrate, therefore, recorded the reasons whether the domestic violence was committed are not fall under the shadow of doubt and accordingly held that there was no domestic violence against the applicant and refused the relief to the petitioner under D.V. Act.

5. Dissatisfied with the order of the learned Magistrate, the applicant had preferred an appeal before the Additional Sessions Judge, Basmathnagar.

6. Analyzing the various provisions of the D.V.Act, the learned Additional Sessions Judge arrived at the conclusion that there was domestic violence and allowed the appeal granting the relief of providing adequate rented accommodation. Till accommodation, the respondent was directed to pay Rs.1500/- towards the rent. The maintenance of Rs.3,500/- per month was also awarded. The lump sum amount of alimony received at the time of the customary divorce was directed to be adjusted towards the arrears of maintenance.

7. Heard the learned counsel for the applicant and the learned counsel for the respondent at length.

8. Learned counsel for the respondent has vehemently argued that since the domestic relationship did not exist on the day of filing the application, the applicant is not entitled to any relief under D.V.Act. He also argued that the divorcee is not entitled to claim the reliefs as the applicant claimed. Since 02.02.2012, she has been residing with her parents. During the pendency of her application, the Civil Court granted a decree of divorce. Therefore, the relationship between them did not exist. He would also argue that once the wife accepted the

lumpsum alimony through the customary divorce, she was not entitled to maintenance under Section 125 of the Cr.P.C.

9. To bolster his argument, he relied on the cases of (i) *Inderjit Singh Grewal Vs. State of Punjab and another, Criminal Appeal No.1635 of 2011 (Arising out of SLP (Cri.) No.7787 of 2010) SC, dated 23.08.2011*, (ii) *Criminal Writ Petition No.259 of 2009, Jayesh Uttamrao Khairnar and others Vs. State of Maharashtra and others, Bombay High Court, Aurangabad Bench, decided on 07.09.2009*, (iii) *Criminal Writ Petition No.1014 of 2017, Anita W/o Anand Tambe, Vs. Anand S/o Eknath Tambe, Bombay High Court, Nagpur Bench decided on 28.02.2018*, (iv) *Criminal Revision Application (Rev.) No.121 of 2018, Smt. Sadhana W/o Hemant Walwatkar Vs. Hemant Shalikramji Walwatkar, decided by this Court at Nagpur Bench on 18.04.2019*. He also relied on the case of *Vitthal Hiraji Jadhav Vs. Harnabai Vitthal Jadhav and another, 2003 (2) Bombay C.R. (Cri.) 1455*. Based on the above case laws and facts, he prayed to allow the criminal revision application and set aside the impugned order.

10. Per contra, the learned counsel for the applicant vehemently argued that the domestic relation subsisted on the date of filing the application. The customary divorce was not

valid. Domestic violence was committed against the victim. The domestic violence report of the Protection Officer was available to the learned Magistrate, but he discarded it without any legal and valid reason. The learned Magistrate did not consider it when it was legally binding for the Court to consider the said report. He would argue that the divorce decree was passed subsequent to the dismissal of the applicant's application filed on 14.08.2012. At the time of filling the application, she had suffered domestic violence; therefore, she was entitled to claim relief under the D.V. Act. The respondent nowhere denied that before she was forced to leave home under the garb of customary divorce, she was residing in domestic relationship and living together in a shared household. The Law is well settled that a subsequent decree of divorce does not debar the woman from the reliefs under the D.V. Act to which she is entitled.

11. To bolster his argument, he relied on the case of ***Juveria Abdul Majid Patni Vs. Atif Iqbal Mansoori and another, (2014) 10 SCC 736***. The unreported judgment of this Court delivered in Criminal Revision Application No.286 of 2018, pronounced on 05.11.2019 in the case of ***Atmaram Narayan Sanap Vs. Sangita W/o Aatmaram Sanap and others***. He also relied on

the case of ***Ramchandra Laxman Kambale Vs. Shobha Ramchandra Kambale and another, 2018 SCC Online Bombay 7039***. On the basis of the legal position settled by the Hon'ble Supreme Court on the grounds raised by the respondent, he would argue that the order impugned before this Court is legal, proper and correct.

12. The first question the respondent raised was that there was no domestic relationship. Therefore, she is not entitled to any relief. It is not in dispute that the applicant has filed an application under D.V. Act after filing a divorce petition. The divorce petition was decided on 22.09.2016.

13. In view of the point raised, the legal answers may be given first. The Hon'ble Apex Court in the case of ***Prabha Tyagi Vs. Kamlesh Devi, (2022) 8 Supreme Court Cases 90***. Discussed the various provisions of D.V. Act and framed the following points in paragraph No.23 in the said judgment.

"(i) Whether the consideration of Domestic Incident Report is mandatory before initiating the proceedings under D.V Act, in order to invoke substantive provisions of Sections 18 to 20 and 22 of the said Act?

(ii) Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been levelled at the point of commission of violence ?

(iii) Whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed ?"

14. As far as the facts are concerned, it is not in dispute that the victim was residing with the respondent when the alleged domestic violence was committed.

15. Hon'ble Apex Court in the *Prabha Tyagi* (cited supra) held that there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief claimed vis-a-vis allegations of domestic violence. However, it is not necessary that at the time of filing an application by an aggrieved person, domestic relationship should be subsisting. In other words, even if an aggrieved person is not in a domestic relationship with the respondent in a shared household at the time of filing of an application under Section 12 of the D.V. Act but has at any point of time leave or had the right to leave and has been subjected to domestic violence or is later subjected to domestic violence on account of a domestic relationship is entitled to file an application under Section 12 of the D.V. Act. The Hon'ble Supreme Court, in clear words, answered that even if a person is not in a domestic relationship with the respondent in a shared

household at the time of filing of the application under Section 12, but has at any point in time, he would so or had the right to live has been subjected to domestic violence is entitled to file an application under Section 12 of the D.V. Act. In view of the ratio laid down by the Hon'ble Court, the Court does not find any substance in the arguments raised by the respondent that she was not living in a domestic relationship at the time of filing of an application under D.V. Act.

16. Hon'ble Apex Court, in the case of *Prabha Tyagi* (supra), has also held that Section 12 does not make it mandatory for the Magistrate to consider a domestic report filed by a Protection Officer before passing any order under the D.V. Act. It was clarified that even in the absence of a domestic incident report, a Magistrate is empowered to pass both ex-parte or interim as well as final order under the Provisions of D.V. Act. Here in the case, the applicant has come with specific allegations of domestic violence, and she was forced to execute a divorce.

17. As far as the ground of customary divorce and the divorce granted to the respondent by a competent Court of Law is concerned, the Law is well settled that the divorce which has been granted under Hindu Marriage Act is only legal

and valid. Only in certain circumstances where the custom exists and is observed continuously then the customary divorce may be considered. For claiming any customary right, the parties claiming such right are bound to prove that the customs of their caste or race still exist and the community at large is regularly observing such customs. Since the applicant approached the Civil Court for divorce, it can safely be held that the customary divorce was not in existence in their caste. Therefore, the respondent cannot claim that after the customary divorce, the domestic relationship ceased, and the applicant is not entitled to the reliefs under D.V. Act.

18. As far as the effect of subsequent legal and valid divorce is concerned, after or during the pendency of D.V. Act is concerned, the said issue was dealt with by the Hon'ble Apex Court in the case of *V. D. Bhanot Vs. Savita Bhanot, (2012) 3 SCC 183*, which was subsequently followed in the case of *Juveria Abdul* (cited supra). The Hon'ble Supreme Court laid down the Law that where an act of domestic violence is once committed then subsequent decree of divorce will not absolved the liability of the respondent from the offence committed or deny the benefit to which the aggrieved person is entitled to.

19. The facts of the case, as discussed above, reveal that the decree of divorce was passed by the competent Civil Court of Law after filing the application under the D.V. Act would not disentitle the aggrieved person to apply for the reliefs under the said Act. In view of the Law laid down by the Hon'ble Apex Court as regards the entitlement of the reliefs under D.V. Act to the aggrieved person, there appears no force in the arguments advanced by the learned counsel for the respondent that since the applicant is divorced, she cannot claim the reliefs under D.V. Act.

20. The last material point that the learned counsel for the respondent raised was that since the lumpsum alimony was accepted, the wife is not entitled to maintenance. To bolster his argument, he relied on the case of *Vitthal (cited supra)*. It was a case under Section 125 of the Criminal Procedure, and this Court observed in the said case that in view of the agreement and acceptance of the lumpsum alimony, at least the said document would have to be treated as a document indicating mutual consent to live separately as contemplated by provisions of Sub Section 4 of Section 125 of the Code of Criminal Procedure, 1973. On the basis of this material, the wife was refused maintenance under Section 125 of the Cr.P.C.

21. The Law is well settled that the person aggrieved may take recourse under various Laws if the right exists. Since maintenance is allowed under Section 125 of the Cr.P.C., the Law does not bar the person entitled to claim the relief under D.V. Act. Section 36 of D.V. Act provides that the D.V. Act is not in derogation of any other law. It is an additional provision of Law not affecting the other provisions of Law available for similar relief. The inquiry under the D.V. Act is independent and has an object to provide for more effective protection of the rights of a woman who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. Since the proceeding under D.V. Act is independent, the ratio laid down in the case of *Vitthal (cited supra)* would not assist the applicant.

22. So far as the other case law relied upon by the applicant cited supra are distinguishable on facts. Hence, they do not come to his help.

23. Examining the legal provisions of Law as discussed above, the Court is of the view that the impugned order is free from flaws, legally correct and proper. Therefore, the criminal revision application deserves to be dismissed. Hence, the following order :

ORDER

- (i) Criminal Revision Application stands dismissed.
- (ii) Rule made discharged. No order as to costs.
- (iii) Record and Proceeding be returned to the learned
Judicial Magistrate First Class, Aundha Nagnath,
District Hingoli.

(S. G. MEHARE, J.)

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vmk/-