

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 30 OF 2010

Mrs. Jovita Olga Ignesia
Mascarenhas e Coutinho,
major, r/o Opp. Assumpta
Convent High School,
Sarzora, Salcete, Goa.

... Petitioner

versus

1. Mr. Rajan Maria Coutinho,
Major, r/o House No.678,
Dandeawaddo, Chinchinim,
Salcete Goa.

2. State of Goa,
through Chief Secretary,
Porvorim Goa.

... Respondents

Mrs. A. A. Agni, Advocate for the Petitioner.

Shri V. Menezes, Advocate for Respondent No.1.

Shri C. A. Ferreira, Public Prosecutor for Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 24TH AUGUST, 2010.

JUDGMENT

Heard.

2. This petition can be considered under Section 482 of the Code (Code of Criminal Procedure, 1973).

3. This petition is directed against Judgment/Order dated 3-3-2010 of the learned Additional Sessions Judge, Margao, by which the learned Additional Sessions Judge has upheld the dismissal of the Petitioner's application filed under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (Act, for short) by the learned J.M.F.C. (Magistrate, for short) by Judgment/Order dated 7-10-2009.

4. The Petitioner and the Respondent were married on 10-4-2005. They lived together till 18-4-2006. Their marriage has now been annulled by the Patriarchal Tribunal for the Archdiocese of Goa and Daman by Judgment dated 17-1-2009, and the registration of their marriage has been cancelled. Their differences now appear to become irreconcilable as efforts to reconcile their differences have failed.

5. The Petitioner had filed a report and an application in the prescribed forms, Forms I and II under Section 12 of the Act on or about 11-12-2007. In the said application, the Petitioner had alleged physical violence on the part of the Respondent of assaulting her on several occasions in the matrimonial house. The Petitioner had sought a Protection Order

prohibiting the Respondent in terms of Section 18, clause (b) (i.e. aiding or abetting in the commission of acts of domestic violence); clause (d) (i.e. attempting to communicate in any form, whatsoever, with her including personal, oral or written or electronic or telephonic contact) and clause (e) (i.e. alienating any assets, operating bank lockers or bank accounts ... etc.). The Petitioner had also sought a Residence Order and that should have been under Section 19(1)(a) and not under Section 19(8). She also sought an order under Section 19(8) (i.e. a direction for return of her stridhan or any other property or valuable security to which she was entitled to). The Petitioner had also sought a Maintenance Order under Section 20(3) (i.e. an Order to pay appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require). In fact, the Petitioner had sought maintenance of Rs.12,000/- per month as well as compensation for acts of domestic violence committed under Section 22 of the Act. These reliefs sought by the Petitioner can be seen from a combined reading of pages 10 of Form I and 1 and 2 of Form II. In other words, the Petitioner had sought from the Magistrate six reliefs. It is conceded that the Petitioner's personal belongings have been returned and therefore no direction need be issued under Section 19(8) of the Act.

6. There is no dispute nor any dispute can be raised that both the Courts below have not at all dealt with the aspect of maintenance claimed by the Petitioner of a sum of Rs.12,000/- per month in terms of Section 20(3) of

the Act and therefore a remand is inevitable. Whether the Petitioner would not be entitled to the said amount of Rs.12,000/- per month because of the annulment of the marriage or otherwise was a matter which was required to be decided by the learned Magistrate, and in fact has not been decided by both the Courts below and to that extent remanding of the case to the Magistrate has become inevitable so that the relief claimed by the Petitioner on that score can be considered by the learned Magistrate.

7. As regards the domestic violence or for that matter physical abuse is concerned, the learned Magistrate is totally silent about it but the matter has been considered by the learned Additional Sessions Judge in the Judgment dated 3-3-2010 observing that the Petitioner had failed to prove any acts of domestic violence against her, had in fact taken place, when she resided alongwith the Respondent in the matrimonial house at Chinchinim. The said attempt appears to be not very satisfactory either, as the learned Additional Sessions Judge has misunderstood the concept of domestic violence. In fact, it appears that another Additional Sessions Judge in Criminal Appeal No.30/2008, between the same parties, had in fact noted in his Order dated 1-8-2008, and in my view rightly, that domestic violence includes “physical abuse”, “sexual abuse”, “verbal and emotional abuse”. The learned Additional Sessions Judge had also observed that to consider the application(under Section 12 of the Act) it is not necessary to consider other forms of abuses

except the economic abuse, since the Complainant had averred that she was living without any monetary support, had no means to support her and that the Respondent had deliberately kept the passbook and the FDR in his custody in order to cause hardship to her.

8. The expression “domestic violence” has a very wide amplitude, as defined under Section 3 of the Act, and it includes, as already stated physical abuse, sexual abuse, verbal and emotional abuse, economic abuse which in turn, inter alia, includes deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an Order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, the property jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance.

9. As already stated, the Petitioner had also sought a Residence Order under Section 19 and whether the Petitioner was entitled to the same or not, as the house did not belong to the couple as defined under Clause 2(s) of the Act or because it belonged to the parents of the couple, was again a matter which was required to be decided by the Magistrate and which admittedly has not been decided.

10. Smt. Agni, learned Counsel on behalf of the Petitioner has submitted that the only relief which does not survive is the relief sought by the Petitioner in column no.5 of the application i.e. for return of the personal belongings of the Petitioner and no other relief as sought for have been considered by the learned Magistrate.

11. Although, the learned Magistrate took note in the first para of the Judgment, of some of the reliefs claimed by the Petitioner, the learned Magistrate has not at all stated in the impugned Order as to why the Petitioner was not entitled to any of the reliefs claimed by the Petitioner. The learned Additional Sessions Judge framed three points for determination and as regards the first point, relying on **Dr. Prakash v. Joshi** (unreported Judgment of this Court dated 18-7-2009) held that an application under Section 12 of the Act was maintainable in relation to the cause of action which took place prior to 26-10-2006 i.e. the date on which the Act of 2005 came to force. Regarding the second point, the learned Additional Sessions Judge completely missed the bus by confusing the concept of physical abuse with the concept of domestic violence and without considering at all whether the Petitioner was entitled to the reliefs claimed by her. Regarding the third point, the learned Additional Sessions Judge held that the Petitioner was entitled to the amount in FDR No.05140. What follows from the above discussion is that both the Courts below were not at all alive to the reliefs claimed by the Petitioner. No reasons

have been assigned why the Petitioner was not entitled to one or the other reliefs. The Act, cannot be termed as new legislation. It is in force for almost five years now. The Magistrates will do well in case they try to understand what is the concept of domestic violence as defined under Section 3 of the Act rather than go by the ordinary concept of violence. The procedure to be followed by the Magistrate, in terms of Section 28 of the Act is that which is prescribed in the Code of Criminal Procedure. Sub-section (2) of Section 28 of the Act provides that nothing contained in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 of the Act.

12. Although the Magistrate is required to follow the procedure as governed by the Code of Criminal Procedure or its own procedure, the nature of proceedings like those under Section 125 of the Code, would be civil. (See P.S.Thube, 1999 Cri.L.J. 2919). Magistrates will do well, after a reply is filed by the Respondent, to find out from the parties or their pleaders what are the reliefs an applicant is seeking in terms of the provisions of the Act and frame issues on the basis of the same. Such a step will not be opposed to any procedural law and that apart it will enable the parties to know each others case and also facilitate a decision thereon.

13. In civil proceedings after perusing the claim and the reply or written statement, issues are framed. Issues are framed when a material proposition of fact or law is affirmed by one party and denied by the other. The object of framing issues plays a distinguished role in a civil proceeding and the whole object is to direct the attention of the parties to the principal questions on which they are at variance and they are required to be framed for the purpose of having the material points in controversy rightly decided, and to bring a finality in the litigation. Unless proper issues are framed, a party who suffers a Judgment on the basis of findings not based on proper issues may have a legitimate grievance to contend that because of such non framing of issues he has been denied the opportunity of leading proper evidence for rebutting relevant facts. Issues can be of fact or of law and the duty is that of the Court to frame the issues. An issue can also be framed on the basis of the reliefs. Although in cases of this nature where there are no pleadings as such and the applications are filed in the prescribed form by ticking the reliefs sought, it would be desirable that the Court after hearing both the parties frames issues on the basis of the reliefs sought by the Petitioner so that each can meet the case of the other and avoid such orders of remand. If this procedure is followed there is no question of any of the reliefs going unnoticed and undecided, like the case at hand. This can also reduce the controversy between the parties, in case the columns in the application, were ticked earlier without much application of mind.

14. The Petitioner had sought Protection Order under Section 18, Residence Order under Section 19, Maintenance Order under Section 20, and Compensation Order under Section 22, etc. Both the Courts below ought to have marshalled the evidence led by the parties on each of the reliefs and given a decision thereon. That has not been done.

15. In the circumstances, therefore, I have no other option but to set aside both the Orders of the Courts below and direct the learned Magistrate to frame the issues regarding the reliefs claimed, after hearing the parties and then consider the evidence produced by the parties and the law applicable and give a decision on each of the reliefs sought by the Petitioner. Consequently, this petition succeeds. The Orders of both the Courts below are hereby set aside and the learned Magistrate is hereby directed to decide the application afresh in the light of observations made.

16. Parties to appear before the learned Magistrate on 5-9-2010 at 10.00 a.m. and the learned Magistrate is directed to decide the application within a period of four weeks, and in case a revision or an appeal is filed therefrom, the same may be decided by the Court of Sessions within a further period of six weeks.

17. Petition disposed of accordingly with no order as to costs.

N. A. BRITTO, J.

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