IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.171 OF 2022

Mr. Ali Hamid Daruwala .. Applicant

v/s.

Mrs. Nahida Rishad Cooper & Ors. .. Respondents

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Mr. Shreyas S. Adyanthaya, for the Applicant.

Ms. Tauban F. Irani, a/w. Ms. Nuzhat Shaikh and Ms. Sachi Lodha, for Respondent No.1.

Mr. A.R. Patil, APP, for State.

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CORAM: R.G. AVACHAT, J.

DATE : 28 FEBRUARY 2023.

P.C:-

Rule. Rule returnable forthwith. Heard finally with consent of parties.

2. The challenge in this revision application is to the judgment and order dated 25 February 2022, passed by the Court of Additional Sessions Judge, Greater Mumbai, in Criminal Appeal No.390 of 2019. Vide order impugned herein, Criminal Appeal No.390 of 2019, preferred under Section 29 of Protection of Women from Domestic Violence Act, 2005 ("D.V. Act") came to be allowed,

setting aside order passed by the Court of Metropolitan Magistrate, on Application Exhibit 3, moved by the Applicant herein in C.C. No.173/ DV/2017, i.e. an application under Section 12 of the D.V. Act.

3. The facts giving rise to the present application are as follows:-

The Applicant is the brother-in-law, real brother of the husband (Respondent No.2) of Respondent No.1 (for short "complainant"), original applicant/complainant.

It is the case of the complainant that she married Respondent No.2 herein on 24 May 2008. The couple is blessed with a child, Marc. On marriage, she started residing with Respondent No.2 in their matrimonial house at "Raj Nest", Lulla Nagar, Pune. The complainant, in her application under Section 12 of the D.V. Act, has asked for the reliefs under Sections 18 to 23 of the D.V. Act. So far as regards the Applicant herein is concerned, there are averments in para 66 and 67 onwards in the complaint/application under Section 12. There are specific averments/allegations as to how the Applicant herein ill-treated the complainant and thereby committed domestic violence. It is her specific case that the Applicant and Respondent No.2 (husband of the complainant) tried to forcibly evict the complainant from her matrimonial home D-38 at Pune.

4. The complaint (application under Section 12 of the D.V. Act) was filed in a Court of Metropolitan Magistrate, Mumbai. It appears that the Applicant and his brother (Respondent No.2) moved an application for discharge. The said application was partly allowed. The learned Magistrate discharged the Applicant from the complaint. The complainant, therefore, preferred appeal against the said order. The appeal came to be allowed setting aside the order passed by the Metropolitan Magistrate, discharging the Applicant from the complaint (proceedings under Section 12 of the D.V. Act). The Applicant is, therefore, before this Court.

5. Heard. Learned Advocate for the Applicant took exception to the impugned order on three grounds. According to him, the appeal was not maintainable against the order granting him discharge. The Applicant was never in domestic relationship with the complainant. He did never reside/stay in a shared household. Learned Advocate adverted this Court's attention to the title of the complaint to indicate that he was residing on some different address. According to him, the allegations in the complaint are all vague, general and ambiguous. Learned Advocate would further submit that proviso to Section 2(q) of the D.V. Act has been deleted in view of the Apex Court judgment in case of *Hiral P. Harsora and Ors. vs. Kusum Narottamdas Harsora & Ors.*[1].

1 Supreme Court in Civil Appeal No.10084 of 2016 (Arising out of SLP (Civil) No.9132 of 2015).

Learned Advocate would further submit that marriage between the complainant and Respondent No.2 was dissolved by decree of divorce. Proceedings over custody of a child is under way. According to learned Advocate, since the Applicant had never been in domestic relationship and has not committed any domestic violence, the learned Metropolitan Magistrate rightly discharged him. He, therefore, urge for allowing the application, setting aside the order impugned herein. Learned Advocate has relied on the following authorities :

(i) Aditi Vivek Kumar Wadhera vs. Vivek Kumar Varinder Wadhera & Ors.[2]

(ii) Mr. Prabhakar Mohite & Anr. vs. The State of Maharashtra & Anr.[3]

6. Learned Advocate for the complainant, on the other hand, adverted this Court's attention to paragraph 67, 68 and 69 of the complaint. She also brought to the notice of this Court e-mails forwarded by the Applicant to the complainant. Learned Advocate then relied on Apex Court judgment in the case of *Prabha Tyagi vs. Kamlesh Devi*[4] to ultimately submit for dismissal of the application.

7. Considered the submissions advanced. Perused the

2 Cri. W.P. No.2542 of 2014 dated 24 September 2014.
3 2018 SCC OnLine Bom 3775.
4 Supreme Court of India Criminal Appeal No.511 of 2022 dated 12 May, 2022.

complaint, e-mails and authorities relied on.

Admittedly, the Applicant is the brother-in-law of the complainant. The appellate court has specifically observed that there are averments in the complaint attributing the Applicant with overt acts of domestic violence. On going through paragraphs 66, 67, 68 and 69 of the complaint, this Court finds averments therein attributing the Applicant to have committed domestic violence, as has been defined in Section 3 of the D.V. Act. The judgment in case of *Prabhakar Mohite* (supra) of this Court would, therefore, be of little assistance to the Applicant herein. The facts in *Prabhakar Mohite*'s case suggest that there were general allegations.

8. Clause 2 and 3 of Statement of Objects And Reasons of the D.V. Act reads, thus:

> "2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.
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> 3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of

domestic violence in the society."

9. Certain definitions given in Section 2 of D.V. Act need to be adverted to. (a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent; (f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family; (q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner; (s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any

right, title or interest in the shared household.

10. Section 28 of the D.V. Act states that save as otherwise provided in the said Act, all proceedings under Sections 12, 18 to 23 and offence under Section 31 shall be governed by the Code of Criminal Procedure, 1973.

11. Section 29 of the D.V. Act provides for a remedy of appeal. The Section reads:-

> "**29. Appeal.**- There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later."

12. According to learned Advocate for the Applicant, the appeal was not maintainable, since the challenge therein was not to an order under any of the Sections 18 to 23. He relies on judgment of this Court in case of *Aditi Wadhera (supra),* wherein it has been observed :

> "Section 29 of the Act refers to 'the order'. 'The order' means the order passed by the Magistrate in exercise of powers u/ss. 18, 19, 29, 21, 22 and 23 of the Act. A preliminary order holding that the proceedings were maintainable under the Protection of Women from Domestic Violence Act, would not be appealable order u/s 29 of the Act, as the said order in fact does not give any

> relief to the aggrieved person nor does it refuse to give any relief available under the Protection of Women from Domestic Violence Act."

13. Reading of the judgment of this Court in *Aditi Wadhera* (supra) would, at first blush, appear that order granting discharge to the Applicant was not appealable. Section 24 of the D.V. Act needs to be adverted to. Section 24 reads, thus:

> "**24. Court to give copies of order free of cost.** -The Magistrate shall, in all cases where he has passed any order under this Act, order that a copy of such order, shall be given free of cost, to the parties to the application, the police officer-in-charge of the police station in the jurisdiction of which the Magistrate has been approached, and any service provider located within the local limits of the jurisdiction of the court and if any service provider has registered a domestic incident report, to that service provider."

14. The phraseology of Section 24 suggests that copy of any order passed by the Magistrate under D.V. Act needs to be provided free of cost. Section 29 of the D.V. Act does not, in so many words, speak of orders, against which remedy of appeal is provided thereunder.

15. Moreover, if proceedings under Section 12 of the D.V. Act are governed by the provisions of Code of Criminal Procedure, 1973, by virtue of Section 28 of the D.V. Act, question is as to how the

Metropolitan Magistrate entertained the application for discharge. Granting of order of discharge from the D.V. proceedings was in the nature of recalling of its own order. Section 362 of Cr.P.C. bars remedy of review.

16. The Apex Court, in the case of *Kunapareddy Alias Nookala Shanka Balaji vs. Kunapareddy Swarna Kumari And Another*[5], has observed that the proceedings under D.V. Act are predominantly of civil nature. It is only when there is a breach of order passed under any of the Section from 18 to 23. Such breach is punishable offence.

17. Furthermore, Apex Court in paragraph No.29 of its judgment in case of *Kamatchi Vs. Lakshmi Narayanan (2022 SCC OnLine SC 446),* has observed:

> "29. It is thus clear that the High Court wrongly equated filing of an application under Section 12 of the Act to lodging of a complaint or initiation of prosecution. In our considered view, the High Court was in error in observing that the application under Section 12 of the Act ought to have been filed within a period of one year of the alleged acts of domestic violence."

18. In view of this, the learned Magistrate ought not to have entertained the application for discharge. When it granted the

5 (2016) 11 Supreme Court Cases 774.

Applicant relief, the said order became amenable to a remedy of appeal. Even if it is assumed that appeal was not maintainable against the said order, the order impugned herein, in the peculiar facts and circumstances of the case, can be treated to have been passed one in exercise of revisional jurisdiction, which did vest with the Court of Additional Sessions, which has decided the appeal. The learned Additional Sessions Judge has rightly dealt with the objection to the remedy of appeal. It observed:

> "4] It was the contention of the respondent No.1 that the present order being not covered by section 29 of the D.V. Act appeal against it is not tenable and the appellant should have filed a revision. That however, is not acceptable as the very right of the appellant to proceed against a respondent was decided by the learned Metropolitan Magistrate and, therefore, such order certainly would be appealable and consequently the present appeal is certainly tenable. If at all the analogy of the respondent No.1 that only the orders made under Sections 18 to 22 of the D.V. Act only are appealable and no other order, then it will also have to be assumed that the learned Metropolitan Magistrate has no jurisdiction to omit any person from the array of the respondents these Sections do not refer to any such jurisdiction. The respondent No.1 himself is a beneficiary of the said order. Now he cannot be allowed to say that no appeal against the said order would lie simply because his such a contention would ultimately mean the learned Metropolitan Magistrate has omitted him without any jurisdiction. The respondent No.1 also cannot be allowed to justify passing of the order and still question in the form in which it is challenged. Thus the appeal in view of Section 29 of the D.V. Act is

certainly tenable."

19. The question that whether the Applicant had domestic relationship or not with the complainant is a question of fact which could only be decided when the parties lead evidence in support of their case. Suffice it to say that averments in paras 67 to 69 of the application/ complaint indicate the Applicant allegedly indulged in domestic violence. He is alleged to have attempted to forcibly evict the complainant from her matrimonial home, which is said to be a family property.

20. Moreover, the Apex Court, in case of *Prabha Tyagi* (supra), decided the following three points:

> "(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?
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> (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?"

21. Decision of the Apex Court, on Point No. (ii) and (iii), has

relevance herein. The Hon'ble Apex Court held that :

> "it is not mandatory for the aggrieved person, when she is related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, to actually reside with those persons against whom the allegations have been levelled at the time of commission of domestic violence. If a woman has the right to reside in the shared household under Section 17 of the D.V. Act and such a woman becomes an aggrieved person or victim of domestic violence, she can seek reliefs under the provisions of D.V. Act including enforcement of her right to live in a shared household.
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> "(iii) Whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed?"
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> It is held that there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed vis-à-vis allegation of domestic violence. However, it is not necessary that at the time of filing of an application by an aggrieved person, the 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 lived so or had the right to live and has been subjected to domestic violence or is later subjected to domestic violence on account of the domestic relationship, is entitled to file an application under Section 12 of the D.V. Act."

22. In short, the learned Metropolitan Magistrate ought not to

have granted the Applicant discharge. The said order tantamount to the Magistrate reviewing his own order. There are averments in the application indicating the Applicant to have indulged in domestic violence. In view of the judgment of Hon'be Apex Court in case of *Prabha Tyagi* (supra), the contention of learned Advocate that the Applicant had never lived in a shared household or was never in domestic relationship with the complainant and, therefore, the application was not maintainable, is not sustainable in law. Moreover, such a question would only be decided on full fledged hearing of the matter, i.e. after parties adduce evidence in support of their respective case.

23. For all the aforesaid reasons, this Court finds the order impugned herein does not warrant any interference therewith. In the result, the application fails. The same is dismissed.

24. On request of the learned Advocate for the Applicant, ad-interim relief to continue for the next four weeks.

(R.G. AVACHAT, J.)