

(2008) 09 BOM CK 0117
In the Bombay High Court
Case No : Criminal W.P. No. 2218 of 2007

Abhijit Bhikaseth Auti

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 16-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1
Companies Act, 1913 — Section 202
Criminal Procedure Code, 1973 (CrPC) — Section 125, 126(2), 128
Protection of Women From Domestic Violence Act, 2005 — Section 12, 12(1), 12(3), 17, 17(1)
Protection of Women From Domestic Violence Rules, 2006 — Rule 6, 6(1), 6(5), 7
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 20, 20(1)

Citation : (2009) CriLJ 889

Hon'ble Judges : Abhay S. Oka, J

Bench : Single Bench

Advocate : U.P. Warunjikar and Nitesh V. Bhutekar, for the Appellant; D.P. Adsule, Assistant Public Prosecutor, S.S. Kulkarni and Sachin P. Chavan, for the Respondent

Final Decision : Dismissed

Judgement

Abhay S. Oka, J.—The submissions of the learned Counsel appearing for the parties were heard on the last date. Following questions arise for consideration in this petition:

(i) Whether an order passed on an application made u/s 23 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the said Act") is appealable u/s 23 of the said Act?

(ii) Whether an appeal will lie u/s 29 of the said Act against every order passed by the learned Magistrate in proceedings initiated on the basis of an application made u/s 12 of the said Act?

(iii) What is the scope of an appeal u/s 29 of the said Act?

Apart from aforesaid questions, there are factual questions arising in this petition.

2. The 2nd respondent is the wife of the petitioner. The marriage between the petitioner and the 2nd respondent was solemnised on 22nd April 2004. According to the case made out by the 2nd respondent, after marriage, she stayed along with the petitioner in Flat No. B-10, Rambaug Colony, Kothrud, Pune. As the 2nd respondent found it inconvenient to attend to her duty by residing at the said premises, a flat being Flat No. B-13, Yashganga Residency, near Trimurti Hospital, Dhayari Phata, Pune was jointly acquired by the petitioner and the 2nd respondent. It is this flat which is the subject matter of dispute in this petition which is hereinafter referred to as "the said flat". It appears that there was a matrimonial dispute between the petitioner and 2nd respondent. The 2nd respondent filed an application u/s 12 of the said Act before the learned Judicial Magistrate First Class, Court No. 4, Pune seeking protection order u/s 18 of the said Act. The prayer in the said application is that the petitioner should be prohibited from committing any act of domestic violence and also from causing any kind of alienation of the said flat and from causing any disposition of the said flat or any encumbrance thereto and from preventing the 2nd respondent from having access to and fro to the said flat and enjoying the said flat as a residence. A prayer was also made for restraining the petitioner from preventing the enjoyment of the 2nd respondent of the said flat as a shared household. A relief was also sought u/s 19 of the said Act.

3. An application was made by the 2nd respondent in the main application u/s 12 of the said Act praying for grant of interim relief in respect of said flat. The said application was opposed by the petitioner by filing a reply. The petitioner filed a combined reply to the main application as well as to the application for interim relief. The said application was partly allowed by the learned Magistrate by order dated 1st March, 2007. The prayer made for interim relief as regards residential accommodation was rejected and a limited relief was granted preventing the petitioner from alienating the stridhan in his possession. The 2nd respondent preferred an appeal u/s 29 of the said Act. By impugned judgment and order dated 15th October, 2007, the appeal was partly allowed by the Sessions Court. The relevant part of the operative order read thus:

(3) The appellant/original applicant-Smt. Nisha Abhijit Auti is entitled to reside in Flat No. B-3, Yashganga Residency, Near Trimurti hospital, Dhayari Phata, Pune, during the pendency of the criminal proceeding.

(4) The respondent No. 1/opponent-husband is restrained from dispossessing or disturbing the possession of the appellant/applicant-wife from the share household i.e. the said flat, during the pendency of the main proceeding.

(5) The respondent No. 1/opponent-husband is further restrained from creating any encumbrances or third party interest in the said flat during the pendency of the main proceeding.

(6) The officer in charge of the nearest police station within the jurisdiction of

which the said flat lies is directed to give protection and assistance to the applicant-wife while implementing this order.

4. The learned Counsel appearing for the petitioner has taken me through applications filed by the 2nd respondent and the orders passed by the learned Magistrate as well as by the Sessions Court. He pointed out that in the reply filed by the petitioner there was a categorical assertion that the petitioner never denied the residential accommodation of the said flat to the 2nd respondent and therefore there was no occasion to grant any interim relief in respect of said flat. The learned Counsel for the petitioner pointed out that though the said flat is purchased in the joint name of the petitioner and the 2nd respondent, the loan taken by them for acquiring the said flat was being repaid only by the petitioner and there is no contribution forthcoming from the 2nd respondent for repayment of the loan. Without prejudice to his rights and contentions, he submitted that if the 2nd respondent gives consent for selling the said flat, another accommodation can be made available elsewhere to the 2nd respondent.

5. He submitted that no appeal will lie u/s 29 of the said Act against an interlocutory order and hence the appeal preferred by the 2nd respondent was not maintainable, He has placed reliance on several decisions of this Court and Apex Court in support of his submissions. His submission was that only against a final order passed by the learned Magistrate on application u/s 12 of the said Act, an appeal will lie u/s 29 and the order dated 1st March, 2007 passed by the learned Magistrate being purely an interlocutory in nature, the appeal itself was not maintainable. In any event, he submitted that there was no occasion to grant interim relief in respect of the said flat and no case was made out for granting any interim protection.

6. The learned Counsel appearing for the 2nd respondent submitted that u/s 29 of the said Act, an appeal was maintainable against every order passed under the provisions of the said Act. He submitted that an appeal will lie even against an interim order passed u/s 23 of the said Act. He submitted that interim order passed u/s 23 cannot be treated as purely an interlocutory order and in fact such orders are orders of moment affecting the rights of the parties. He submitted that the decisions relied upon by the counsel for petitioner and especially the decision of the Division Bench of this Court under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 will have no application as the scheme of the said Act is totally different. He pointed out the objects and reasons of the said Act. He invited my attention to the scheme of the entire Act and submitted that no interference was called for. He also stated that the order impugned has been already acted upon.

7. I have carefully considered the submissions. The object of the said Act is to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

8. Section 3 of the said Act defines domestic violence. The definition of domestic violence is very wide and apart from other aspects it encompasses within itself physical abuse, verbal abuse, sexual abuse, emotional abuse and economic abuse. Section 12 forming part of Chapter IV of the said Act provides for an application being made by an aggrieved person or a protection officer or any other person on behalf of aggrieved person. The application is maintainable before a Judicial Magistrate First Class or a Metropolitan Magistrate as the case may be. Aggrieved person as defined by Clause (a) of Section 2 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. Sub-section (3) of Section 12 provides that every application under Sub-section (1) shall be in such form and contain such particulars as may be prescribed. The Protection of Women From Domestic Violence Rules, 2006 (hereinafter referred to as the said Rules) have been framed under the said Act. Rules 6 and 7 are the relevant Rules which lay down the procedure. The said Rule 6 and Rule 7 are as under:

6. Application to the Magistrate: (1) Every application of the aggrieved person u/s 12 shall be in Form II or as nearly as possible thereto.

(2) An aggrieved person may seek the assistance of the Protection Officer in preparing her application under Sub-rule (1) and forwarding the same to the concerned Magistrate.

(3) In case the aggrieved person is illiterate, the Protection Officer shall read over the application and explain to her the contents thereof.

(4) The affidavit to be filed under Sub-section (2) of Section 23 shall be filed in Form III.

(5) The applications u/s 12 shall be dealt with and the orders enforced in the same manner laid down u/s 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

7. Affidavit for obtaining ex parte orders of Magistrate: Every affidavit for obtaining ex parte order under Sub-section (2) of Section 23 shall be filed in Form III.

9. Form II of the said Rules incorporates a format of the application under Sub-section (1) of Section 12. The format requires that the nature of reliefs sought shall be incorporated in the application. Sub-rule (5) of Rule 6 provides that an application u/s 12 shall be dealt with and the orders passed thereon shall be enforced in the same manner laid down u/s 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code"). The procedure which governs an application u/s 125 of the said Code will apply to the proceedings of an application u/s 12 of the said Act. The procedure contemplated by Chapter IX of the said Code which deals with applications u/s 125 is a summary procedure as indicated by Sub-section (2) of Section 126 of the said

Code. Section 128 provides for enforcement of the order of maintenance. Thus, the orders passed by the learned Magistrate under the said Act are enforceable in the same manner as provided u/s 128 of the said Code.

10. While dealing with the procedure, it will be necessary to refer to Section 28 of the said Act which reads thus:

28. Procedure: (1) Save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22, and 23 and offences u/s 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973.

(2) Nothing in Sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application u/s 12 or under Sub-section (2) of Section 23 (2 of 1974).

11. The reliefs which can be granted on an application u/s 12 the said Act can be broadly classified as under:

(i) protection orders u/s 18 which are for preventing the respondent from committing an Act of Domestic Violence;

(ii) residence orders u/s 19;

(iii) Monetary relief u/s 20 which includes maintenance, loss of earnings, medical expenses and loss caused due to destruction, damage or removal of any property from the control of the aggrieved person;

(iv) custody orders u/s 21 dealing with temporary custody of any child or children to the aggrieved person or visitation rights to aggrieved person u/s 21; and

(v) compensation orders u/s 22.

12. Section 17 reads thus:

17. Right to reside in a shared household: (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship, shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

13. Sub-section (1) of Section 17 starts with a non-obstante Clause which has overriding effect over other statutes. The Sub-section provides that every woman in a domestic relationship shall have right to reside in a shared household whether or not she has any right, title or beneficial interest in the same. This is indeed a provision which enlarges the scope of the concept of matrimonial home under the existing laws dealing with matrimonial relationship. This is in the context of the definition of domestic relationship under Clause (f) of Section 2

which means 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 a marriage. The definition of shared household u/s 2(s) of the said Act is very wide. It even includes a household which may belong to the joint family of which the respondent is a member. Section 19 which gives power to the Magistrate to pass residence orders providing for grant of various orders in relation to a shared household for protecting the rights of the aggrieved person to occupy a shared household. The learned Magistrate in a given case can even direct the respondent to remove himself from a shared household.

14. Section 23 of the said Act reads thus:

23. Power to grant interim and ex parte orders: (1) In any proceedings before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person u/s 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent.

15. There was some debate before this Court as regards the spheres in which Sub-section (1) and Sub-section (2) of Section 23 operate. A contention was sought to be raised by the learned Counsel appearing for the 2nd respondent that power under Sub-section (2) is confined to granting interim reliefs under Sections 18 to 22 of the said Act and the power under Sub-section (1) is a larger power which extends to grant of any interim order as the learned Magistrate deems it just and proper which may not be covered even by any of the Sections 18 to 22. On plain reading of Section 23, the legal position appears to be different. This Court has already held that when an aggrieved person desires to claim any interim relief u/s 23 of the said Act, it is not necessary for the aggrieved person to take out a separate application for interim relief and the only requirement of law is that an affidavit in prescribed Form HI of the said Rules has to be filed by the aggrieved person. Sub-section (2) provides that when such an affidavit is filed in the prescribed form by the aggrieved person and if the application u/s 12(1) of the said Act prima facie discloses that the respondent thereto is committing or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, the learned Magistrate may grant ex parte order under Sections 18, 19, 20, 21 or as the case may be u/s 22 against the respondent. Thus, Sub-section (2) of Section 23 confers a power on the Magistrate to grant an ex parte ad interim relief. The said ex parte ad interim relief can be granted in terms of reliefs u/s 18 to Section 22 of the said Act. Sub-section (1) deals with grant of an interim relief or interim order. Thus, the scheme of the Section 23 appears to be that under Sub-section

(2) on the basis of an affidavit, an ex parte ad interim order without prior notice to the respondent can be passed by the learned Magistrate in terms of Sections 18, 19, 20, 21 or 22 of the said Act against the respondent. Sub-section (1) provides for passing an interim order which is to operate till the final disposal of the main application under Sub-section (1) of Section 12 or till the same is modified earlier. Though a separate application is not necessary to be made for grant of interim relief, principles of natural justice require that before granting interim relief in terms of Sub-section (1) of Section 23, the respondent in the main application will have to be heard. Therefore, before granting interim relief under Sub-section (1) of Section 23, a notice will have to be served to the respondent. It is well settled position of law that an interim relief can be granted only in the aid of final relief which can be granted in the main proceedings. In the case of proceedings under Sub-section (1) of Section 12 of the said Act, the learned Magistrate can pass final orders covered by Sections 18, 19, 20, 21 or 22 of the said Act and therefore it is obvious that interim order which can be granted under Sub-section (1) of Section 23 can be only in terms of reliefs provided for in Sections 18 to 22 of the said Act. Under Sub-section (1) of Section 23 a relief which is not covered by any of the Sections 18 to 22 of the said Act cannot be granted. Thus in short, the power under Sub-section (2) of Section 23 is of grant of an ex parte ad interim relief in terms of Sections 18 to 22 of the said Act and the power under Sub-section (1) is of grant of interim relief pending final disposal of the main application u/s 12(1) of the said Act.

16. It will be necessary to refer to Section 29 of the said Act which reads thus:

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.

17. On plain reading of the Section 29 which provides for an appeal to the Court of Session against an order made by the Magistrate which is served on the aggrieved person or the respondent as the case may be. The orders contemplated under the said Act can be broadly divided into three categories. The first category is of the final order passed on application under Sub-section (1) of Section 12. The second category is of the ex parte ad interim orders under Sub-section (2) of Section 23 of the said Act and the third category will be of the interim orders under Sub-section (1) of Section 23 of the said Act.

18. Certain submissions were made on the basis of a decision of Division Bench of this Court in the case of Central Bank of India v. Kurian Babu 2004 (4) MLJ 1006 : AIR 2005 (Bom) 562 . In the said decision, the Division Bench of this Court has dealt with provision of appeals u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the said Act of 1993). After considering the decision of the Apex Court in the case of Central Bank of India Vs. Shri Gokal Chand, as well as in the case of Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, , the Division Bench held that though Section 20 of the said Act provides for an appeal against every order

made by the tribunal constituted under the said Act of 1993, the orders which are purely procedural which do not affect the substantive rights of the parties are not appealable u/s 20(1) of the said Act of 1993.

19. It will be necessary to consider the decision of the Apex Court in the case of Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, . The Apex Court was dealing with a provision relating to an appeal u/s 202 of the Companies Act, 1913 which provided for an appeal from any order or decision given in the matter of winding up of the company by the Court. The Apex Court held that by virtue of Section 202 of the said Act of 1913, an appeal will not lie against purely procedural orders which do not affect the rights or liabilities of the parties. In the case of Central Bank of India (supra), the Apex Court was dealing with Section 38 of the Delhi Rent Control Act, 1958 which provided for an appeal against every order passed by the Controller. The Apex Court relied upon the decision in the case of Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, and held that though the phraseology used in the Section 38 was very wide, the said Section excludes merely procedural orders or orders which do not affect the rights or liabilities of the parties.

20. Now turning to Section 29 of the said Act, it is true that an appeal will lie against every final order passed by a learned Magistrate. The question which arises is whether an appeal will lie against an ex parte ad interim order passed under Sub-section (2) and against an interim order under Sub-section (2) of Section 23. The learned Counsel appearing for the 2nd respondent relied upon the decision of the Apex Court in the case of Amar Nath and Others Vs. State of Haryana and Another, . He submitted that every interim order cannot be treated as an interlocutory order. He submitted that as observed by the Apex Court there are orders which are matters of moment and which affect or adjudicate the rights of the parties or a particular aspect of the trial. He pointed out that the Apex Court has held that such orders cannot be interlocutory orders. On plain reading of Section 29 of the said Act, the orders which are made under Sub-section (1) and Sub-section (2) of Section 23 will have to be held to be an orders made by Magistrate under the provisions of the said Act. The power u/s 23 is of grant of ex parte ad interim and interim relief in terms of Sections 18 to 22 of the said Act. Therefore, the orders passed both under Sub-section (1) and Sub-section (2) will be appealable. However, the scope of interference in appeal against such ad-interim or interim orders will be naturally limited. The orders contemplated by Section 23 are discretionary orders. The Apex Court had an occasion to deal with the power of the Appellate Court and scope of appeals against interim orders which are discretionary in nature. In the case of Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others, the Apex Court dealt with an appeal provided under Rule 1(r) of Order XLIII of the Code of Civil Procedure, 1908 against an interim order of injunction. Paragraph Nos. 125 and 126 of the said judgment read thus:

125. We are not oblivious that normally the appellate Court would be slow to

interfere with the discretionary jurisdiction of the trial Court.

126. The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate Courts will usually not interfere with it. However, the appellate Courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the Court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and time again.

(Emphasis added)

21. In view of what is held by the Apex Court, while the Court of Session deals with an appeal from an order made u/s 23, the Court of Session will be governed by the aforesaid constraints. Thus, the scope of appeal against an order u/s 23 will be limited. While dealing with an appeal against an ex parte ad interim order, the Sessions Court will be very slow in interfering with such orders unless the orders are perverse or patently illegal. However, the scope of an appeal against a final order on application u/s 12(1) of the said Act will not be governed by the aforesaid constraints.

22. As held by the Apex Court in the case of Central Bank of India Vs. Shri Gokal Chand, and Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, , an appeal u/s 29 will not be maintainable against the purely procedural orders such as orders on application for amendment of pleadings, orders refusing or granting adjournments, order issuing witness summons or orders passed for executing the orders passed under the said Act etc.

23. My attention was also invited to Section 26 of the said Act. If relief under the provision of Sections 18 to 22 of the said Act is granted by a Civil Court or Family Court, an appeal will not lie u/s 29 inasmuch as an appeal u/s 29 will lie only against an order of the learned Magistrate.

24. Now turning to the facts of the case in hand, it must be stated that it is an admitted position that the said flat has been acquired in the joint names of the petitioner and the 2nd respondent. It is true that in the reply filed by the petitioner he has stated that he has never denied residential accommodation of the said flat to the 2nd respondent. However, while considering the prayer u/s 23 of the said Act, the learned Magistrate is required to consider the averments made in the main application under Sub-section (1) of Section 12. The learned Additional Sessions Judge has adverted to the averments made by the 2nd respondent and has passed a discretionary order granting protection to the 2nd respondent in respect of said flat which prima facie appears to be a shared accommodation within the meaning of Section 17 of the said Act. In so far as suggestion given by the counsel appearing for the petitioner is concerned, the parties cannot be compelled to accept the said suggestion. The order passed by the learned Additional Sessions Judge is an interim order which will remain in force till final disposal of application under Sub-section (1) of Section 12 of the

said Act. In view of the admitted position that the flat is acquired in the Joint names of the petitioner and 2nd respondent, no case for interference is made out.

25. Thus, the conclusions which can be summarized are as under:

(i) An appeal will lie u/s 29 of the said Act against the final order passed by the learned Magistrate under Sub-section (1) of Section 12 of the said Act;

(ii) Under Sub-section (2) of Section 23 of the said Act, the learned Magistrate is empowered to grant an ex parte ad interim relief in terms of Sections 18 to 22 of the said Act. The power under Sub-section (1) is of granting interim relief in terms of Sections 18 to 22 of the said Act. Before granting an interim relief under Sub-section (1), an opportunity of being heard is required to be granted to the respondent.

(iii) An appeal will also lie against orders passed under Sub-section (1) and Sub-section (2) of the Section 23 of the said Act which are passed by the learned Magistrate. However, while dealing with an appeal against the order passed u/s 23 of the said Act, the Appellate Court will usually not interfere with the exercise of discretion by the learned Magistrate. The appellate Court will interfere only if it is found that the discretion has been exercised arbitrarily, capriciously, perversely or if it is found that the Court has ignored settled principles of law regulating grant or refusal of interim relief.

(iv) An appeal u/s 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties.

26. Before parting with this judgment, appreciation has to be recorded about the able assistance given by the learned Counsel appearing for the petitioner and 2nd respondent.

27. Hence, I pass the following order:

(i) The petition is rejected with no orders as to costs.

(ii) The learned Magistrate will finally decide the application under Sub-section (1) of Section 12 of the said Act within a period of three months from the date of production of authenticated copy of operative part of this order.