
(2021) 12 BOM CK 0129

In the Bombay High Court

Case No : Miscellaneous Civil Application No.76 Of 2021

Anirudh Ajaykumar Garg

APPELLANT

Vs

State Of Maharashtra, Through Govt. Pleader

RESPONDENT

Date of Decision : 15-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 227
Protection Of Women From Domestic Violence Act, 2005 — Section 12, 18, 19, 20, 21, 22, 23, 26, 29, 31
Code Of Criminal Procedure, 1973 — Section 200
Code Of Civil Procedure, 1908 — Section 24
Family Courts Act, 1984 — Section 7(1)(b), 19(1)

Citation : (2021) 12 BOM CK 0129

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : Rohini M. Amin, A.R. Patil, Surel Shah, Hare Krishna Mishra

Judgement

C.V. Bhadang, J

1. By this Application, purportedly filed, under Article 227 of the Constitution of India, the Applicant-husband is seeking transfer of D.V. case No.6 of 2020 from the file of the learned 40th Additional Chief Metropolitan Magistrate at Girgaon, Mumbai to the Family Court at Bandra where Petition No.A-156 of 2021 filed by the Applicant, for dissolution of marriage and for custody of the children is pending.

2. The brief facts necessary for the disposal of the Application may be stated thus.

3. The Applicant married with the Respondent No.2 on 12 February 2011. They were blessed with twins on 5 September 2014. However, the marriage thereafter ran into rough weather and as a result thereof, the parties are litigating before different Courts.

4. On 13 February 2020 the Respondent No.1-wife filed a complaint under

Section 12, 18, 19, 20, 22 and 23 of the Protection of Women from Domestic Violence Act, 2015 ('the act of 2005' for short) against the Applicant and the Respondent Nos.3 and 4 who are the parents of the applicant and which is registered as D.V. Case No.6 of 2020 (D.V. case for short). That case is pending before the learned Additional Chief Metropolitan Magistrate at Girgaon, Mumbai. Indisputably the applicant has filed an application under Section 21 of the said act, in those proceedings, seeking visitation rights which application is said to be pending.

5. The Respondent Nos.3 and 4 have also filed an application under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 against their daughter-in-law i.e. Respondent No.2.

6. On 17 January 2021 the applicant filed Petition No.A-156 of 2021 against the Respondent No.2 for dissolution of marriage, inter alia on the ground of cruelty and for custody of the children. That Petition is pending before the Family Court at Bandra, Mumbai.

7. It may be mentioned that a protection order was passed by the Additional Chief learned Metropolitan Magistrate in the D.V. case in favour of the respondent No.2 on 29 February 2020. The respondent No.2 has filed an application claiming breach of the said order against the applicant and the Respondent Nos.3 and 4 which is registered as Summons Case No.869/SS/2020, which is pending before the learned Metropolitan Magistrate at Girgaon, Mumbai. According to the Respondent No.2 the learned Additional Chief Metropolitan Magistrate has taken cognizance of the said case on 24 November 2020 and verification of the Respondent No.2 was recorded under Section 200 of Criminal Procedure Code on 13 August 2021. It is a matter of record that subsequently the learned Additional Chief Metropolitan Magistrate has passed an order, issuing process against the Petitioner and the Respondent No.3 under Section 31 of the Act of 2005 on 30 September 2021.

8. For the limited purpose of deciding the present application for transfer, it is not necessary to set out the other cases, where the parties are litigating against each other.

9. According to the applicant, he is required to prosecute the Petition for dissolution of marriage before the Family Court and the D.V. case before the learned Additional Chief Metropolitan Magistrate which is causing inconvenience and prejudice. It is submitted that both these cases essentially arise out of the matrimonial discord, between the parties and raise similar/connected issues of law and fact. It is therefore, contended that for the purposes of convenience of the trial and to avoid any conflicting decisions, it is necessary to transfer the D.V. case to the Family Court.

10. The Respondent No.2 has filed a detailed reply and has resisted the application on various grounds.

11. It is contended that this Court in exercise of the supervisory jurisdiction under Article 227 of the Constitution of India, cannot direct such transfer from the file of the Metropolitan Magistrate to the Family Court. It is contended that apart from the D.V. case there is also a summons case No.869/SS/20 initiated by the Respondent No.2 seeking action against the applicant and the Respondent Nos.2 and 3 for breach of the protection order. It is submitted that these proceedings under Section 31 of the Act of 2005 are clearly of a Criminal/penal nature, which cannot be transferred to or entertained by the Family Court. It is contended that the marriage petition is only between the applicant and the Respondent No.2 and the Respondent Nos.3 and 4 are not parties before the Family Court. It is contended that the D.V. case and the summons case seeking action for breach of the protection order have to be tried together and therefore, the D.V. case cannot be transferred, once the learned Additional Chief Metropolitan Magistrate has taken cognizance and issued process in the Summons case.

12. I have heard Ms.Amin, the learned counsel for the applicant and Mr.Shah, the learned counsel for the Respondent No.2. With the assistance of the learned counsel for the parties, I have gone through the record.

13. The learned counsel for the applicant has submitted that the dispute is essentially arising out of the matrimonial discord and looking to the issues involved in both cases, it is necessary that the D.V. case is transferred to the Family Court. It is submitted that otherwise it would result into conflicting decisions.

14. On behalf of the applicant reliance is placed on the decision of Supreme Court in Kunapareddy V/s. Kunapareddy Swarna Kumar & Anr (2016) 11 SCC 774 and decisions of this Court in case of Sanket Sanjeev Khanolkar Vs. Surabhi Sanket Khanolkar MANU/MH/1107/2021, Mr.Abhishek N. Billawa & Ors V/s. Mrs.Teashree Abhishek Billawa Misc. Civil Application 47 of 2020 Decided on 14.12.2020 , Santosh Machindra Mulik V/s. Mohini Mithu Choudhari MANU/MH/3459/2019, Sandip Mrimoy Chakraborty V/s. Reshita Sandip Chakraborty and Ors. MANU/MH/2593/2018 , Mr.Rushabh H. Zaveri and Anr. V/s. Ashmi R. Zaveri and Anr. 2017 SCC Online Bom 5877 , Minoti Subhash Anand V/s. Subhash Manoharlal Anand MANU/MH/3383/2015 and Pramodini Vijay Fernandes V/s. Vijay Fernandes MANU/MH/0135/2010

15. It is submitted that this Court in several cases has directed such transfer and the contention raised about the jurisdiction and powers of this Court to direct such transfer and the jurisdiction of the Family Court to entertain the D.V. case has been considered by this Court and cannot be revisited.

16. The learned counsel for the Respondent No.2, has strenuously urged that this Court in exercise of the supervisory jurisdiction under Article 227 of the Constitution of India, cannot direct such transfer. It is submitted that under Article 227 of the Constitution of India this Court exercises supervisory

jurisdiction over the Courts and Tribunals subordinate to it, which jurisdiction is aimed at ensuring that the Courts and Tribunals subordinate to this Court, act within the bounds of their authority. It is submitted that there is no order passed by such Court which is subject matter of challenge in this Petition, in order to exercise jurisdiction under Article 227 of the Constitution of India. In short according to the learned counsel, the power of Superintendence under Article 227 of the Constitution of India, does not take into its ambit, the power to direct transfer. It is submitted that the Court of the Metropolitan Magistrate may be administratively subordinate, however, it is not a Court subordinate to the High Court even under Section 24 of the Code of Civil Procedure. It is contended that the D.V. case is not only between the Petitioner and the Respondent No.2 but also against the Respondent Nos.3 and 4 who are not parties in the matrimonial petition filed by the Petitioner. It is submitted that there is also a summons case seeking action for breach of the protection order in which the Additional Chief Metropolitan Magistrate has taken cognizance and issued process on 30 September 2021 and the D.V. case has to be tried with the summons case.

17. On behalf of the Respondent No.2 reliance is placed on the decision of the Supreme Court in *Manmohan Attavar V/ s. Neelam Manmohan Attavar* (2017) 8 Supreme Court Cases 550 , *State of West Bengal and Others V/s. Samar Kumar Sarkar*(2009) 15 Supreme Court Cases 444 and the decision of this Court in *Sandip Mrimoy Chakraboarty V/s. Reshita Sandip Chakrabarty and Ors.* Manu/MH/2593/2018

18. It is submitted that such transfer if ordered would also result into a loss of Appellate remedy which is not permissible for which reliance is placed on the decision of the Supreme Court in *Thakur Jugal Kishore Sinha v/s. Sitamarhi Central Co.Op. Bank Ltd. And Anr.* (1967) 3 SCR 163.

19. I have given my anxious consideration to the rival circumstances and the submissions made. It is now well settled that the proceedings under the Domestic Violence Act are predominantly of a civil nature. In the case of *Kunapareddy* (Supra), the issue before the Supreme Court was whether amendment of the complaint can be permitted. The Supreme Court inter alia held that most of the reliefs that can be granted by the final order, or by an interim order, under the said Act of 2005 are of civil nature and therefore, the amendment was rightly allowed by the Trial Court which was confirmed by the High Court. Thus merely because the Act requires the complaint to be tried by a Metropolitan or a Judicial Magistrate, does not make any difference and the proceedings do not cease to be civil in nature.

20. The next issue is whether the Family Court can entertain a complaint under the Act of 2005. This issue also may not detain me long, as it is covered by multiple decisions of the learned Single Judge of this Court in the case of *Minoti Subhash Anand, Sandeep Chakraboarty, Santosh Machindra Mulik Mr.Rushabh H. Zaveri and Anr. V/s. Ashmi R. Zaveri and Anr.* (2017) SCC Online Bom 5877 and *Hitesh Prakashmalji Metha V/s. Aashika Hitesh Mehta* Manu/MH/1515/2020 . The

learned counsel for the Petitioner pointed out that the decision of this Court in Hitesh Mehta has attained finality, as the Special Leave Petition against the same has been dismissed, by the Supreme Court on 25 March 2021.

21. It hardly needs to be stated that I am bound by the said decisions of the coordinate Bench of this Court . Thus, it is not possible to revisit the said contention and issue about the jurisdiction of the Family Court to entertain an application to grant relief which the Magistrate can grant under section 18 to 22 of the Act of 2005. This Court in the case of Hitesh Prakashmalji Mehta has noticed that there is consistent view taken by this Court that Section 7(1)(b) of the Family Courts Act read with Section 26 of the Act of 2005 confers jurisdiction and powers on the Family Court to entertain application seeking reliefs under the provisions of Section 18 to 22 of the Act of 2005.

22. The contention that under Article 227 of the Constitution of India this Court cannot direct transfer also to my mind cannot be accepted. It is now well settled under the Article 227 of the Constitution of India this Court exercises supervisory jurisdiction both judicial as well as administrative over the Courts and Tribunals subordinate to this Court. That such a power to transfer can also be traced to Section 24 of the C.P.C. For instance in Sanket Khanolkar, this Court had directed such transfer, in an application under Section 24 of the C.P.C., while in Minoti Anand, it was an application under Section 24 of the C.P.C. along with Article 227 of the Constitution of India. In my considered view the lable under which the Petition is filed may not be decisive and the question would be one of the existence of the jurisdiction and power to direct transfer. In several decisions which have been noted above, such transfer has been directed by the learned Single Judge even under Section 24 of the Code of Civil Procedure. At the cost of repetition it is necessary to emphasize that I am bound by these decisions of the coordinate Bench.

23. Coming to the contention based on the pendency of the summons case, the Petitioner has not sought the transfer of the said case to the Family Court. Therefore strictly speaking the said issue does not arise for consideration. However, according to the Respondent No.2 it is necessary that the summons case is tried with the complaint case under the Act of 2005 which contention cannot be accepted, for the reason that the only question in the said summons case is whether there is a breach of the protection order dated 29 February 2020 by the Petitioner and the Respondent Nos.3 and 4. Except this there is no adjudication of any other dispute in the said case arising out of the matrimonial discord between the parties.

24. A brief reference may now be made to the decisions on which reliance is placed on behalf of the respondent No.2. In Manmohan Attavar the Respondent was claiming to be the wife of the Appellant and had initiated proceedings under Section 12 of the Act of 2005 for various reliefs. At the request of the Respondent the proceedings were transferred from the file of the Metropolitan Magistrate 6th Court to Court of Metropolitan Magistrate-II at Bengaluru. The

application was finally dismissed by the learned Metropolitan Magistrate. The Respondent-Lady challenged the same in an appeal under Section 29 of the Act before the learned Sessions Judge. The Respondent again sought transfer of the said Appeal which was transferred to another Court. It appears that the Respondent-lady feeling aggrieved by the conduct of the proceedings during the hearing of the Interim Application submitted a complaint to the High Court of Karnataka. In terms of the administrative order of the Registrar General the interim application was directed to be decided in a time bound manner. The application was finally rejected as not maintainable. The application filed by Respondent-lady for additional evidence also was dismissed. It is in these circumstances that the respondent-lady filed a Writ Petition before the High Court for transfer of Criminal Appeal No.1070 of 2015 to the High Court on the ground that the order rejecting the Application for additional evidence "did not inspire faith". The learned Single Judge directed transfer of the Appeal to the High Court, which order was subject matter of challenge before the Supreme Court. It is in these peculiar circumstances, that the Supreme Court, held that the Appeal could not have been transferred by the High Court to itself resulting into a loss of remedy. In my humble view the facts in the said case are clearly distinguishable.

25. In Samar Kumar Sarkar the High Court, in exercise of the jurisdiction under Article 227 of the Constitution of India had withdrawn a Petition from the Administrative Tribunal to itself, which was found to be impermissible.

26. In Thakur Jugal Kishor Singh the issue was whether the Assistant Registrar of Co-operative Societies, was a 'Court' within the meaning of the contempt of Courts Act 1995 and even if it was a Court whether it was a Court subordinate to the Patna High Court. The third issue was pertaining to the factual dispute in that case. It can thus be seen that the case clearly turned on its own facts.

27. In Sandip Marinmoy Chakrabarty the issue which fell for determination before the Division Bench was whether an Appeal under Section 19(1) of the Family Courts Act, 1984, is maintainable also in respect of reliefs granted by the Family Court under the provisions of the Domestic Violence Act along with reliefs granted in the divorce proceedings under the Special Marriage Act.

The Division Bench held that since the reliefs granted by the Family Court in the application filed by the respondent under the provisions of the Domestic Violence Act were of civil nature the appeal was maintainable.

It is difficult to see as to how the said judgment can come to the aid of the Respondent No.2. Quite to the contrary, the remedy of an appeal subsists.

28. Insofar as the loss of a forum of appeal is concerned, this Court has refused to accept a similar contention in the case of Santosh Mulik in which this Court has observed as under:-

Learned Counsel for the Respondent further submits that transfer of the Criminal proceeding curtails the right of the Respondent-wife to file an appeal, which she

ordinarily would have had if the proceeding were to be decided by the criminal court. We are concerned in the present case essentially with the justice of the case in having the two matters heard together. On the one hand, we have a situation where two different courts would be required effectively to consider the same set of circumstances and could have arrived at two different conclusions or, even possibly, conflicting conclusions, and on the other hand, if this situation were to be avoided, and it appears to be imperative that it be avoided, one particular stage of challenge would be missed. In any event, since from the domestic violence proceeding that may be heard along with the matrimonial proceeding before the Family Court, an appeal would lie to this court, and in that sense, no party can be said to be losing his/her right of appeal, what is lost is a further right of revision. That, however, is no ground to deny transfer of proceedings on the basis of the principle of justice noted above.

I am in respectful agreement with the view as taken.

29. I have considered the nature of the dispute and the grounds in both matrimonial Petition and the proceedings under the Act of 2005. Essentially the dissolution of marriage is sought by the Petitioner on the ground that he has been treated with cruelty by the Respondent No.2. In the DVA proceedings the Respondent No.2 is claiming that she has been subjected to Domestic Violence arising out of the matrimonial relationship. In my considered view common and connected questions would arise in both these petitions and therefore it would be appropriate if the proceedings pending before the Metropolitan Magistrate are transferred to the Family Court. The application is accordingly allowed. The D. V. Case No.6/2020 is withdrawn from the file of the learned 40th Additional Chief Metropolitan Magistrate at Girgaon, Mumbai and is transferred to the Family Court at Bandra, Mumbai, for disposal according to law.

In the circumstances, there shall be no order as to costs.

30. At this stage, the learned counsel for the Respondent No.2 sought stay of this order in order to enable the Respondent No.2 to decide about further course of action.

31. The prayer is opposed on behalf of the Applicant.

32. However, looking to the circumstances and the nature of the dispute, there shall be stay of the present order for a period of three weeks from today. This shall be subject to the statement made on behalf of the Respondent No.2 that she will seek adjournment of the D. V. case before learned Magistrate. If such adjournment is sought, the learned Magistrate shall adjourn the D. V. case beyond three weeks.