

(2009) 03 CAL CK 0009
In the Calcutta High Court
Case No : C.R.R. No. 2838 of 2008

Asifa Khatoon

APPELLANT

Vs

Rubina and State of West Bengal

RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 96
Criminal Procedure Code, 1973 (CrPC) — Section 12, 17, 19, 2, 20
Protection of Women From Domestic Violence Act, 2005 — Section 12, 17, 18, 19, 2

Citation : (2010) 6 RCR(Criminal) 2032

Hon'ble Judges : Parth Sakha Datta, J

Bench : Single Bench

Advocate : Debasis Roy, for the Appellant; Joymalya Bagchi for the Opposite Party No. 1 and Deep Chain Kabir, R.S. Chatterjee for the Opposite Party No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Partha Sakha Datta, J.—The question that arises in this application u/s 482 of Cr.PC is whether the petitioner herein who was not a party to the proceeding being Misc. Case No.57 of 2008 u/s 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, the Act) wherein the learned ACJM at Durgapur upon an application of the opposite party herein u/s 12 of the said Act, passed an order on 3rd of July, 2008 granting right of residence against her husband who was the opposite party before the learned Magistrate has right of appeal u/s 29 of the said Act or not.

2. The petitioner who is the mother of opposite party No.1 before the learned Magistrate contends that since she was not a party to the proceeding but is aggrieved by the order of the learned Magistrate because of the alleged fact that the house in which the right of residence has been granted to her daughter-in-law does not belong to his son is competent enough to file this application u/s 482 of Cr.PC invoking inherent jurisdiction of this Court to have the order

impugned nullified as the right of appeal does not belong to her in view of the definition of the word "aggrieved person" as it occurs in clause (a) of section 2 of the said Act. The second branch of argument of the petitioner herein is based on the decision of the Hon"ble Supreme Court in S. R. Batra & Anr. vs. Tarun Batra, as reported in 2006(4) Cri 433(SC), wherein Their Lordships negated the wife's claim for residence in the house belonging to her mother-in-law.

3. The opposite party before the learned Magistrate contended in her application u/s 12 of the Act that she resided with her husband at Rahmatnagar under PS Hirapur, District Badwan which according to the wife was "shared household" as defined in clause (s) to section 2 of the Act.

4. The learned Magistrate by the order impugned granted right of residence u/s 12 read with section 19 of the Act.

5. According to the petitioner who is the mother of the opposite party No.1 before the learned Magistrate, the house wherein right of residence has been granted does not belong to his son nor was it taken on rent by him nor was it a joint family property of which his son, who is the husband of opposite party herein, is a member and it exclusively is the property of the petitioner; as such it cannot be called to be a "shared household".

6. Learned Counsel for the opposite party submitted that the instant application u/s 482 of Cr.PC is a mala fide one in this that the husband of the opposite party who along with opposite party resided in the house in question undisputedly has set up his mother to challenge the order impugned by invoking the jurisdiction of the Court u/s 482 of the Cr.PC instead of preferring a regular statutory appeal u/s 29 of the Act. The Learned Counsel submits that where the statute prescribes a right of appeal a catena of decision of the Hon"ble Supreme Court has made the point clear that the invoking of the inherent jurisdiction of the Court is not maintainable. Secondly, it is submitted that the decision of the Supreme Court in S.R. Batra (supra) is in a different fact situation which cannot be taken into consideration as an aid of the petitioner's case. It is submitted that the Court must first decide before entering into the merits of the case as to whether the petitioner has a right of appeal or not and if the Court find that an appeal is maintainable at the instance of the petitioner then the Court must not enter into the merit of the case of either of the parties so as to precipitate the decision which the statutory authority before which an appeal is maintainable may take upon hearing the parties. Learned Counsel for the opposite party refers to the decisions in Virtual Soft Systems Ltd. Vs. Commissioner of Income Tax, Delhi-I, ; Maya Devi vs. State of NCT Delhi, Cr. Misc. Case No.3064/07 (Crl.M.A.No.11002/2007) (Delhi High Court); P. Chandrasekhara Pillai Vs. Valsala Chandran and Another, (Kerala High Court); Sulochana and Another Vs. Kuttappan and Others, Chitrangathan vs. Seema, 1(2008) DMC 365 (Kerala High Court); Fousiya D/o Aboobacker vs. Muringakandy Jasmi, AP (C) No. 1540 of 2008(G) (Kerala High Court); Ajay Kant and Others Vs. Smt. Alka Sharma, (Madhya Pradesh High Court); N.P. Ponnuswami Vs. Returning Officer, Namakkal

Constituency and Others, Mary Angel vs. State of T.N., 1999(5) SCC 146; Hamida vs. Rasheed, 2008(1) SCC 474; Anandwardhan and Another Vs. Pandurang and Others, Madhu Limaye Vs. The State of Maharashtra,

7. The section 12 embraces in itself and covers the remedies available to the aggrieved person u/s 17 which grants right of residence in a "share household", section 18 deals with protection order, section 19 speak of residence order following from section 17, section 20 relates to monetarily relief and section 21 provides for order for custody. Section 23 enables the Magistrate to pass an interim and ex parte order in respect of any of the aforesaid matters pursuant to an application u/s 12 of the Act. Now, section 29 reads as follows:

"There shall lie an appeal to the Court of Session within 30 days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondents, as the case may be, whichever is later."

8. The bone of contention centers around the scope and ambit of the words "aggrieved person" as has been defined in clause(a) of section 2 of the Act. The words "aggrieved person" has been defined as such:

"aggrieved person means any women 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."

9. Mr. Roy's submission is that the petitioner, the mother-in-law of the opposite party, so far as she is concerned, feels herself to be an "aggrieved person" in view of the fact that she is affected by the order impugned but is not an "aggrieved person" within the meaning of the words in as much as the definition clause clearly indicates that the words relate to the woman who has been in a domestic relationship with the respondent. In terms of section 29 of the Act, it is the aggrieved person or the respondent who has right of appeal to the Court of Session within the time stipulated therein. A person not a party to the proceeding could not be under the law served with a copy of the order impugned and in such circumstances, the only remedy available to the petitioner, is to file an application u/s 482 of the Cr.PC.

10. Mr. Kabir, learned Advocate for the opposite party submitted that the scheme of the Act does not leave any scope to any person said to be affected by an order to prefer a revisional application u/s 482 of the Cr.PC because of incorporation of the right of appeal which the petitioner herein has not been divested of.

11. The question therefore is whether the petitioner can be said to have been excluded from the purview of the words "aggrieved person" as has been defined in clause (a) of section 2 of the Act. The husband who was the respondent before the Magistrate may be affected by the order and in broader sense, he is also an "aggrieved person" but not an "aggrieved person" in the sense in which the term has been defined in the Act The petitioner also claims to have been affected by the order adversely and feels herself aggrieved. Now an anomalous situation

would happen if the husband prefers an appeal u/s 29 on the assured ground that he has a right of appeal thereunder, and another person who feels aggrieved by the order impugned but not a party before the Magistrate files a revisional application u/s 482 of the Cr.PC. Therefore, consideration has to be had to the question whether the "aggrieved person" in clause (a) of section 2 of the Act can have extended meaning to include within itself a person who is affected by the order as may be passed by the Magistrate u/s 12 of the Act but not a party to the proceeding. The question revives in the shape whether under the scheme of the Act, a person feeling aggrieved by the magisterial order and who is not a party to the proceeding in respect of which the order is passed has been precluded from preferring appeal. In construing the scope of section 96 of the Civil Procedure Code, Their Lordships of the Supreme Court in *Adi Pherooshah Gandhi Vs. H.M. Seervai*, Advocate General of Maharashtra, Bombay, have expounded the law that a person who is not a party to a decree or order may, with the leave of the Court, prefer an appeal from such decree or order if he is either bound by the decree or order or is aggrieved by it or is otherwise prejudicially affected by it. In the said decision, it has been held that whether a person is an "aggrieved person" one is to see whether he has a genuine grievance because an order has been made which prejudicially affected his interest either pecuniary or otherwise. Their Lordships observed:

"Generally speaking, a person can be said to be aggrieved by an order which is to his detriment, pecuniary or otherwise, or causes him some prejudice in some form or other. A person who is not a party to a litigation has no right to appeal merely because the judgment or order contains some adverse remarks against him. But it has been held in a number of cases that a person who is not a party to a suit may prefer an appeal with the leave of the Appellate Court and such leave would not be refused where the judgment would be binding on him and Explanation VI to section 11 of the Code of Civil Procedure."

12. The principle enunciated by Their Lordships of the Supreme Court as above is enough indication of the probable proposition that in the matter of preferring appeal against the magisterial order passed u/s 12 of the Act, a person claiming to have been adversely affected by such order can be termed to be an aggrieved person within the meaning of the word as it appears in section 29 of the Act. The definition clause in section 2 begins with the words "unless the context otherwise requires." The words appearing in clauses to section 2 of the Act is *prima facie* restrictive and not inclusive. It is common knowledge that when words have been defined in the interpretation clause, *prima facie* that definition governs whenever it occurs in different sections of the Act but where the context makes the definition given in the interpretation clauses inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause. All definitions given in interpretation clauses are therefore normally subject to the qualification "unless there is anything repugnant in the subject or context", or "unless the context otherwise requires". This is what has been laid down by their Lordships of the

Supreme Court in series of decisions some of which may be referred to as *Dhandhaniah Kedia and Co. Vs. The Commissioner of Income Tax, and Special Officer and Special Officer and Competent Authority, Urban Land Ceilings, Hyderabad and Another Vs. P.S. Rao*, . In *K. V. Muthu vs. Angamuthu Ammal*, AIR 1997 SC 626, it has been observed that interpretation should not only be not repugnant to the context, it should also be such as would aid the tune of the purpose which is sought to be served by the Act and a construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted. By no stretch of reasoning can it be assumed that the intention of the legislature was to oust a person from ventilating his or her grievance in the matter of an order of the Magistrate u/s 12 of the Act in a proceeding to which he or she was not a party, though he or she feels adversely affected by it, more particularly when the order relates to a quasi-civil proceeding. Therefore, right of appeal has to be extended to such a person who is aggrieved by the order of the Magistrate, even if one is prone to argue that the expression "aggrieved person" has to be used in the restrictive sense whenever the expression has been used in different sections of the Act. I, therefore hold that right of appeal has not been taken away from the petitioner by the scheme of the Act and it cannot be conceived of that only a party to the proceeding who is adversely affected by the order of the Magistrate can prefer appeal and a person equally adversely affected who was not a party to the proceeding can prefer appeal with the leave of the Court.

13. This being the position, it is not proper to traverse the merit of the case particularly when the opposite party against which the impugned order has been passed is not a party to this application. In *N.P. Ponnuswami (supra)* it has been held that where right or liability is created by statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

14. In *Fousiya, D/o Aboobacker vs. Muringakandy Jasmi (supra)*, the petitioner before the High Court of Kerala was not a party to the proceeding before the Magistrate. She filed revisional application before the High Court and it was observed that if the petitioner is aggrieved by the impugned order she must certainly be held to be having a right of appeal u/s 29 of the Act. In *Maya Devi*, reported in MANUIDE/8716/2007, it was observed by the Delhi High Court while interpreting section 25 of the Act that "any aggrieved person" may make an application before the Magistrate for alteration, modification or revocation of any order made under the Act.

15. Accordingly, the application is found to be not maintainable. The application is dismissed. The petitioner if so advised may approach the appropriate forum.

16. Urgent xerox certified copy of this judgment be supplied to the parties, if applied for.