

(2023) 04 DEL CK 0048

In the Delhi High Court

Case No : Criminal Writ Petition No. 1140 Of 2022, Criminal Miscellaneous
Application No. 9666 Of 2022

Divya

APPELLANT

Vs

State Of Nct Of Delhi & Anr

RESPONDENT

Date of Decision : 11-04-2023

Acts Referred:

Indian Penal Code, 1860 — Section 380, 441, 442, 443, 445, 448, 454
Protection of Women from Domestic Violence Act, 2005 — Section 12, 17

Citation : (2023) 04 DEL CK 0048

Hon'ble Judges : Anish Dayal, J

Bench : Single Bench

Advocate : `Preeti Singh, Sulan Porwal, Sumya Dwivedi, Kunkum Mandhanya, Rachana, Rishabh Munjal, Simranjeet, Amol Sinha, Jatan Singh, Siddharth Singh, Tushar Lamba

Final Decision : Disposed Of

Judgement

Anish Dayal, J

1. By this petition the petitioner seeks quashing of FIR No. 339/2022, P.S. Shahbad Dairy registered under Sections 454 and 380 of the IPC. The FIR was lodged on the basis of a complaint filed by the father-in-law of the petitioner for allegedly committing offences of house trespass, house breaking and theft in the matrimonial house in which she resided at post her marriage.

2. The petitioner and respondent No.2 son were married on 11th December, 2021. The petitioner was residing in the matrimonial home bearing house No. 137-138, 2nd floor, A-3, Sector-11, Rohini, Delhi-110085 along with her in-laws. Owing to physical, mental and emotional torture as alleged by the petitioner meted out to her by her husband and in-laws, she filed a complaint under Section 12 of the Protection of Women from Domestic Violence Act, 2005, (PWDV), on an apprehension that she would be dispossessed from the shared household. The Ld. MM vide an order dated 26th April, 2022 granted a protection

order in favour of the petitioner restraining the respondents therein from dispossessing her from the matrimonial home without following the due process of law. As per the petitioner when she went back to her matrimonial home from the Court she found the doors of the house locked and thus took refuge at her parental house for the night. On the next day i.e. 27th April 2022, when she went to the matrimonial home, her husband and in-laws were present but did not allow her to enter the house. She went to the police station to seek assistance where the SHO asked her to wait who then went to the house to question the family. Allegedly, when the SHO took her back to the house, the gates were locked and the family had gone away. Having received no cooperation or assistance from the police, she was left with no option but to use a spare set of keys in order to enter in her matrimonial house.

3. Later, respondent No. 2 (the father in-law) and other family members appealed against the protection order stating that the house was locked and the petitioner may create a law and order situation. Ld.ASJ vide order dated 28th April 2022 stayed the protected order of the Ld. MM. The petitioner filed an application for vacation of stay and vide order dated 9th May 2022, Ld.ASJ clarified the order wherein it was directed that respondent No. 2 and his family not to do any illegal act of dispossessing the petitioner from the matrimonial household. Immediately thereafter on 11th May 2022 respondent No. 2 got the instant FIR registered, which the petitioner claims is evidently a counter blast to harass the petitioner further.

4. The petitioner therefore seeks quashing of this FIR on the basis that the petitioner has not filed a petition against the petitioner. It is contended that the petitioner is a legitimate member of the matrimonial household as it is a shared household and has a right to reside. Also, she has legitimate court orders in her favour for protection from dispossession. In these circumstances, the question of trespass does not arise ex facie on the very ingredients of Section 443 of the IPC which involves the "the right to eject" a trespasser from a premises. Further, it is contended that the definition of house breaking under Section 445 of the IPC can only be invoked when the charge of criminal trespass can be established. Also criminal trespass as defined in Section 441 of the IPC involves an intention to commit an offence or to intimidate, insult or annoy any person in possession of such property, which the petitioner contends was not her intent, but only to reside in the property that she was entitled to by virtue of her marriage.

5. The learned counsel for the petitioner placed reliance on the decision of the High Court of Madras in *Vandhana v. T. Shrikant*, 2007 (5) CTC 679, where it was held that the entry of the wife into her matrimonial home is a matter of right and the right can be exercised forcibly or otherwise. Reliance was also placed on *Kavita Dass v. NCT of Delhi & Anr*, where this Court has held that the wife rightly entered the house which was a matrimonial home and her possession may not amount to criminal trespass. It was therefore contended that the petitioner did not enter into any stranger's property but of the shared household and on the

basis of a protection order in her favour. She had also approached a police official for help but failing to receive help from them, she exercised her right to reside in the shared household and such an act would or not amount to criminal trespass. Further the charge of theft was bogus and not made out since the complainant has failed to state as to what property has been moved from where to which place and there is no mention of the same in the FIR either as to what was stolen. With regard to the reliance placed on the CCTV footage, it has been contended that the CCTV footage was not filed by the SHO in the contempt case No. 669/2022 despite directions of this Court on 30th August 2022 as the SHO stated on affidavit filed by the SHO PS Shahbad Dairy in the contempt proceedings. It was further contended that the CCTV footage could not be procured. Clearly the FIR was registered without adverting to the CCTV footage.

6. The State has placed reliance upon Status Report filed by the SHO per which the petitioner had come to the PS Shahbad Dairy on 27th April, 2022 and produced court order dated 26th April, 2022 passed by the Ld. MM. protecting the petitioner from dispossession from the matrimonial home. As per the SHO, when they went to the premises, the gate was found locked. Later the petitioner entered the house after breaking the lock. A complaint was received on behalf of the respondent No. 2 on 30th April, 2022, inter alia stating that on 27th April, 2022 when he along with his family had returned to the house, that they had locked, from Gurugram, they were shocked to see that the house had been broken into by the petitioner. After perusing the CCTV footage, the complainant found that between 4:00PM to 04:15 P.M., petitioner had reached the house along with some police officials who then left the place and later came back along with some other persons and trespassed into the house. The locks were broken at the instance of the petitioner. Allegations of theft were also made but no specific details were given at that stage. As per the Status Report, list of stolen articles were provided later, which were allegedly taken by the petitioner. Later when the appeals against the order dated 26th April 2022 were pending and had been stayed by the Ld. ASJ, another complaint was received on 03rd June 2022 by the petitioner that when she had gone out and came back to the matrimonial home she found that the locks had been changed. When the police went with her to the house, they found the gate was locked from inside and despite repeated requests the gate was not unlocked by the respondent. Later, pursuant to an application filed by the petitioner, the Ld. MM had directed on 18th June 2022, that necessary police assistance be provided to the petitioner so she may be able to re-enter the matrimonial home. However when they reached the house, they found the gate locked. The husband was contacted but stated that his family members had evicted him and he no longer lives there.

7. From a perusal of records of the case including the aforementioned various orders of the Ld. MM, it is not disputed that the aforementioned premises was the matrimonial home of the petitioner. Even though the FIR states that the petitioner was not residing at the matrimonial house and was residing at her parents' house, it is evident from the sequence of the events that she was

staying at her parental house on a temporary basis since she was denied entry into matrimonial home for which she had to seek orders of protection under the PWDV Act. It would therefore apposite to consider whether a married woman by entering into her matrimonial home under the cover of protection order from the Court would amount to criminal trespass. Reference may be made to the following decisions:

(i) The decision of this Court in Kavita Dass (supra) which was also based on a petition for quashing of FIR registered against the wife under Section 448 IPC which involved entry by the wife into a new matrimonial home with the help of a Protection Officer, this Court took note of the decision of Hon'ble Supreme Court in Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel reported as (2008) 4 SCC 649, where it was observed by the Apex Court as under:

"....The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right to residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share..."

This Court therefore held that it was incumbent upon the Magistrate to pass orders for the wife to enter into the house or that there should be restraint from being thrown out of the house without due process of law. Further, being a legally wedded wife, she had a right to live with the husband and a direction to vacate the house would be illegal including the fact that registering a case against the wife for not vacating the house would be bad in law. On this basis, the FIR in the said matter was quashed.

(ii) In Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel (supra), it was held that it was not necessary for a woman to establish a physical act of living in the shared household at the time of institution of the proceedings. And that she would be entitled to a protection under Section 17 of the Act as a consequence to the relationship of marriage. The status of marriage gave the wife the right to live in the shared household and therefore "her entry into the household is as a matter of right, whether the exercise of such right happened on 13th June 2007 or on any other date, forcibly or otherwise".

8. With regard to the CCTV footage, it was stated by the SHO on affidavit filed in the contempt proceedings that when they approached the neighbour for procuring an uninterrupted CCTV footage, on 31st August 2022, it was found that the DVR system installed at the neighbour's house could only store CCTV recording for a period of 8 days. Therefore, the CCTV recordings as directed in the order dated 26th April till 28th April 2022 could not be procured. The affidavit further states that other inquiries were made from other neighbours but no CCTV recordings were found for the concerned period. However, apparently respondent No.2 did have the video recordings from the DVR of the neighbour clips of which were shown in the Court. It does seem that the petitioner, as identified by the IO, is proceeding towards the house along with police officials, around 16:26

hours, on 27th April, 2022 , in order to secure entry which is evident from the photographs of the footage. The snapshots from the CCTV would indicate that at 16:25 hours the police officials along with petitioner were at the door of the said property. At 16:37:47 hours, the petitioner had left the said area. The allegation of house break is being made on account of presence of two gentlemen on a motorcycle who seem to be present at the door at 18:24 hours and then at 18:42 hours. However, the CCTV footage does not show the presence of the petitioner during that time. Notwithstanding the statement by the SHO in the affidavit of the CCTV footage, even the CCTV footage ex facie does not provide any evidence of forced entry by the petitioner into the house. As per her statement, she had used a spare set of keys to enter the shared household, she claims she was residing there and was inside the house when the respondent No. 2 and the family came back.

9. Be that as it may, and without adverting to any factual aspects, it would suffice to unambiguously accept that the petitioner had the benefit of a protection order on 27th April 2022 when the allegation of a criminal trespass has been made and which was also later confirmed by the dismissal of the appeal filed by the husband. It is the said that the protected order was appealed against by the husband and the family including respondent No. 2 before the Ld. MM which appeal was dismissed and the said order of Ld. MM was upheld. It was noted in that order that the contention of the husband and the family that the petitioner was not in possession of the household was not reflected from any of the pleadings or affidavits. Rather, from the documents before the Court it was evident that the petitioner was residing in the shared household. Therefore, whether lurking house trespassing or house breaking can be deciphered in these fact and circumstances remains to be seen.

10. House trespass (Section 442 IPC) involves criminal trespass (Section 441 IPC) which in turn requires a categorical intent to commit an offence and entry into property that is in the possession of another or even a scenario where one lawfully entered their property but unlawfully continued to stay in the said property. In view of the above decisions cited, read in concurrence with the orders passed by the learned MM and the learned ASJ, the petitioner had an undeniable right to be reside in the shared property and had obtained a protection order. Therefore the question of the property being in possession of another does not arise, nor can such an intent be imported and insinuated.

11. If the offence of house trespass is not made out, then ipso jure, the offence of house breaking would also be not made out as defined under Section 445 IPC neither would lurking house trespass under section 443 IPC. The incontrovertible legal right of the petitioner to reside in the shared household erodes the very basis of offences as alleged.

12. As regards the allegation of theft, considering that the FIR does not provide any details in column No. 9&10 and a generic allegation is made, particularly in view of the facts and circumstances of matrimonial discord, it would not be

unreasonable to conclude that it is concocted to wreck vengeance with a mala fide purpose.

13. In this light, reliance is placed in State of Haryana v. Bhajan Lal & Ors (1992) Supl. SCC 2 335 where the Hon'ble Supreme Court has given illustrations of situations where inherent powers under Section 482 of the CrP.C. can be exercised to prevent abuse of process and to secure to the ends of justice. Reliance is placed on the on the 7th category of the aforementioned list that mentions categories of cases where such powers should be used – "where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge".

14. It is quite evident that the FIR was lodged in order to retaliate and as a counter blast to the petitioner having sought entry into the matrimonial household on the basis of a protection order. Therefore, it is clear that the proceedings were maliciously instituted with an ulterior motive to pressurize the accused on account of matrimonial discord.

15. The petitioner has made serious allegations of cruelty having been meted out to her by the husband and the family including alleged demands of dowry and physical abuse at the hands of her husband. The petitioner has also alleged that she was forced to drink "All Out" mosquito repellent. Petitioner had adverted to MLC dated 12th March 2022 where it was noted that she was admitted to a hospital with an alleged history of physical assault at her home by the husband followed by ingesting "All Out" around 12:00 P.M. It is noted in the advice at discharge that special care had to be taken regarding the head injury, vomiting and pain in her abdomen.

16. In the considered opinion of this Court, entry of the petitioner into her matrimonial home is a matter of legal right and in this case secured by a protection order. The petitioner is entitled to exercise her legal right. On the contrary, the petitioner being excluded from her matrimonial home, would in these circumstances, be a transgression of the law. In view of the facts and circumstances stated herein above, the complaint, on the basis of which the FIR has been registered, seems to be clearly vexatious, mala fide, with no legal basis, and made only to pressurize the petitioner due to the serious marital discord.

17. The petition is therefore allowed and the FIR No. 339/2022 registered at PS Shahbad Dairy is accordingly quashed. Pending applications, if any, are disposed of as infructuous.

18. Order be uploaded on the website of this Court.