(2016) 08 GUJ CK 0092

In the Gujarat High Court

Case No : Criminal Revision Application (Against Order Passed By Subordinate Court) No. 625 of 2015

Kusumben Ambalal Shah APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 458A
Protection of Women From Domestic Violence Act, 2005 — Section 2(f), Section 2(g)

Citation : (2016) 08 GUJ CK 0092

Hon'ble Judges : Mr. S.G. Shah, J.

Bench : Single Bench

Advocate : Vikram Nankani, Sr. Advocate with Mr. Keyur Gandhi with Raheel Patel for Nanavati Associates, Advocate, for the Appellants; Mr. Prabhav A. Mehta, Advocate, for the Applicant No. 1 - 3; Kamal Trivedi, Advocate General with Mr. Sangita Vishen, AGP, for the

Final Decision : Dismissed

Judgement

Mr. S.G. Shah, J. (CAV) - Heard Ld. Advocate Mr. Prabhav A. Mehta for the petitioners and Ld. Advocate Mr. A.R. Gupta for the respondent and Ld. A.P.P. Mr. K.P. Raval for the State. Perused the record. The petitioners herein are facing proceedings under the Protection of Women from Domestic Violence Act, 2005 ("D.V. Act" in short) initiated by the respondent no.2. The petitioner no.1 is mother-in-law, the petitioner no.2 is father-in-law and the petitioner no.3 is brother-in-law of the respondent no.2, whereas her husband has not challenged the impugned orders or proceedings in any manner at least in this revision petition.

2. The sum and substance of main submission by the petitioners is to the effect that, they are not residing together with the complainant wife of their son and her husband being their son and therefore, proceeding cannot be initiated against them under the Protection of Women from Domestic Violence Act, 2005. For the purpose, the petitioners are mainly relying upon the provisions of section

2 (f) and 2 (g) of the Domestic Violence Act, which reads as under.

2 (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.

2 (g) - "domestic violence" has the same meaning as assigned to it in section 3;

3. However, the bare perusal of such provision makes it clear that, a victim of Domestic Violence can seek relief under the Act from the persons with whom she has domestic relationship which 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 consent, unity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Whereas the respondent means any adult male person, who is or has been, in domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act. Therefore, it is contended that, when there is ample evidence to show that aggrieved person - respondent and petitioners are not residing either in a shared household or not living together as a joint family, then they cannot be considered as a respondent-accused, therefore no complaint can be filed against them. To substantiate their such arguments, the petitioners are relying upon several averments in complaint and in different pleadings.

4. In complaint dated 18th February, 2009 before the Vadodara Police Station which is registered as C.R.No.5/2009, respondent ? wife has categorically stated that she is residing in Flat No.2/A with her husband, her daughter and son of her husband whereas in adjoining flat/house her in-laws were residing, therefore, it is emphasized that, when she has admitted that, in-laws are residing in adjoining flat/house and thereby they are not residing in the same household, no complaint can be lodged against them.

5. They are also relying upon the cross examination of the aggrieved person i.e. the respondent no.2, wherein she has admitted that, where she was residing in Vadodara is a three storied flat, wherein her brother-in-law was residing on first floor, whereas on second floor, she was residing with her husband in flat no.2/A and in adjoining flat no.2/B, her parents-in- law were residing, however immediately, thereafter, there is a disclosure that in fact, since all such flats are having two rooms only they were unable to stay jointly in one flat and therefore, there are different flats, but they have common kitchen. It is also coming on record during evidence of the aggrieved person that, in fact there was a door between two flats so as to access both the flats from inside, in addition to main outer door, because practically two flats are only because of inadequate space of one flat for accommodating six persons, otherwise kitchen was common and thereby, they were residing in the same flat. Thereby, there is an issue regarding

actual evidence regarding the property in question so also the aboard by aggrieved person and respondent in such premises because so far as oral or documentary evidence is concerned, both the sides are plying different tune, wherein on one hand petitioners are saying that, there was separate kitchen for different flats but aggrieved person is saying that, there was direct access between two flats and two flats are only because of the reasons of the total number of persons staying together and that the kitchen is common. It is also coming on the record that, in fact there was no wall at all between flat nos.2-A and 2-B, when she got married but it was constructed only after her marriage, keeping a door between only with a view to see that present petitioners being inlaws can have a sound sleep and take rest without disturbance.

6. Both the parties have alleged and argued against each other on several aspects but at present, considering that the impugned order dated 16th December, 2011 is below an application at Exhibit 74 by the petitioners-respondents to drop the proceedings against them i.e. practically for discharging them; when this court has to decide that whether the present petitioners can be discharged summarily by dropping proceedings against them, practically in such revisional jurisdiction, the scope of interpreting the prima-facie evidence in pleading is quite limited because parties are yet to adduce their evidence to prove their rival claims before the trial court. Therefore, only because of some observations in the judgment and order dated 24th May, 2016 acquitting the present petitioners from the charges under section 498 (A) and 114 of the I.P.C. read with section 3 and 7 of the Dowry Prohibition Act could not be considered as final determination of the issues which are yet to be decided by the trial court in the main application for reliefs under the Domestic Violence Act filed by the aggrieved person. It is also submitted by the aggrieved person that an order of acquittal referred herein-above is under challenge in an appeal and therefore, since appeal is a continuous proceeding, it cannot be said that, the judgment of acquittal by the trial court is conclusive proof of what is determined by the trial court. More particularly, when there was no such issue which was to be decided by that court as to whether or not the petitioner is entitled to reliefs under the Domestic Violence Act or that whether parties have lived together in a shared household or whether they are family members living together as a joint family.

7. Since I am of the opinion of not to interfere and disturb the impugned order, I do not think it proper to discuss the entire evidence in detail for the simple reason that, it is to be appreciated in proper perspective after proper admission of reliable evidence on record of the trial court and therefore, discussion or determination on any issue at this stage would certainly disturb and prejudice the rights of both the parties so also the court which is yet to decide the main application under the Domestic Violence Act. However, it would be proper to list the submission of both the sides so as to enable the trial court to be vigilant and to answer relevant issues and to decide the same in accordance with law after affording reasonable opportunity to both the sides to adduce proper evidence either to prove their case or to disprove and rebut the case of other side.

8. The petitioner has submitted following points for consideration :

(1) Parties are living separately, (2) No allegation about joint family, (3) Judgment of acquittal in Criminal Case No.971/11 dated 24th May, 2016, (4) Marriage life between the respondent and her husband was of a very short span, (5) Husband was residing in U.S.A., (6) After acquittal under section 498 (A), there cannot be a trial under the Domestic Violence Act, (7) Aggrieved person - wife had waived her several reliefs, (8) Relief of compensation, monthly maintenance etc. can be granted only against the husband and (9) There is evidence that, electricity connection, gas connection and B.S.N.L. connection are in different names and therefore, there is a prima-facie evidence that, they are not residing together.

9. However, as discussed herein-above all such evidence is yet to be adduced before the trial court and therefore, only because of acquittal in a case under section 498 (A), it cannot be said that, no proceeding can be continued under the provision of the Protection of Women from the Domestic Violence Act, 2005.

10. It is quite clear and obvious that, the complaint under section 498 (A) of I.P.C. so also under the Dowry Prohibition Act is mainly for punishment of wrongdoers whereas the application under the Domestic Violence Act is for different reliefs like protection, provision for residence, monetary relief, order of custody of minor and compensation, therefore scope and purpose of both the acts are different. One should not ignore the provision of sub section (3) of section 31 of the Domestic Violence Act, wherein it is specifically provided that, the Magistrate while dealing with the complaint under the Domestic Violence Act is entitled to frame charges under the provision of the Section 498 (A) of the I.P.C. or any other provision of that code or under the Dowry Prohibition Act Domestic Violence Act also. Therefore, practically, for the same act, there can be charges under different enactments, and if the Magistrate who has tried the case under section 498 (A) is not aware about the pendency of other proceeding and thereby, if he does not frame charges under all the acts, it cannot be said that, only because of the acquittal from one offence, there cannot be an application under the Domestic Violence Act. Whereas, as aforesaid, the scope of both the acts are altogether different, wherein object of Domestic Violence Act is not to convict the respondent but to grant several legitimate benefits in favour of the aggrieved person. Section 31 (3) of Domestic Violence Act reads as under :

31. Penalty for breach of protection order by respondent.

(3) - While framing charges under sub-section (1), the Magistrate may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

11. The respondent is relying upon following citations.

(1) Sangita Mahendra Patel v. State of Gujarat reported in 2012 (7) SCC 621, wherein the Hon''ble Supreme Court has considered the plea of double jeopardy and held that, for an offence under I.P.C. through issue of mens-rea may be important and relevant whereas, in another offences, in a given case offence under the Negotiable Instrument Act, where there is no issue of mens-rea, it cannot be compared with the provisions of I.P.C. and therefore, it is held that, subsequent case under the Negotiable Instrument Act is not barred.

Hon''ble the Supreme Court has by referring Maqbool Hussain v. State of Bombay reported in AIR 1953 SC 325 by the Constitution Bench of the Supreme Court which had dealt with the issue wherein the central issue arose in the context of the plea of "autrefois acquit" which was raised seeking protection under Article 20(2) of the Constitution of India, 1950 (hereinafter called the ''Constitution'') and consider the outcome by the Constitution Bench that the fundamental right which is guaranteed under Article 20 (2) enunciates the principle of "autrefois convict" or "double jeopardy" i.e. a person must not be put in peril twice for the same offence. The doctrine is based on the ancient maxim "nemo debet bis punire pro uno delicto", that is to say that no one ought to be twice punished for one offence. The plea of "autrefois convict" or "autrefois acquit" avers that the person has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other and not that the facts relied on by the prosecution are the same in the two trials. A plea of "autrefois acquit" is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter.

The Hon''ble Supreme Court has further observed that, the principle of issue estoppel in a criminal trial observing that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence, which is designed to upset a finding of fact, recorded by a competent court in a previous trial on a factual issue. (Vide: Pritam Singh and Anr. v. The State of Punjab, AIR 1956 SC 415; Manipur Administration, Manipur v. Thokchom Bira Singh, AIR 1965 SC 87; Workmen of the Gujarat Electricity Board, Baroda v. Gujarat Electricity Board, Baroda, AIR 1970 SC 87; and Bhanu Kumar Jain v. Archana Kumar and Anr., AIR 2005 SC 626: (2005 AIR SCW 270)). This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. What is necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. Doctrine of double jeopardy is enshrined in Section 300, Cr.P.C. and Section 26 of the General Clauses Act. Both the provisions employ the expression "same offence".

Similar view has been reiterated by the Supreme Court in State of Haryana v. Balwant Singh, AIR 2003 SC 1253: (2003 AIR SCW 1645), observing that there may be cases of misappropriation, cheating, defamation etc. which may give rise to prosecution on criminal side and also for action in civil court/other forum for recovery of money by way of damages etc. Therefore, it is not always necessary that in every such case the provision of Article 20(2) of the Constitution may be attracted. The law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or Section 300, Cr.P.C. or Section 71, IPC or Section 26 of General Clauses Act, ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not identity of the allegations but the identity of the ingredients of the offence. Motive for committing offence cannot be termed as ingredients of offences to determine the issue. The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420, IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and only the person who draws the cheque can rebut that presumption. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.

(2) Pradhyumnaben S. Harish v. State by Jayankar Police Station reported in I.L.R. 2010 Karnataka 4217, wherein while dealing with the section 300 and 482 of the Code of Criminal Procedure, the court has held that, there is no dispute that, when the earlier proceedings were initiated under the provisions of "The Protection of Women from Domestic Violence Act" and not for any of the offences under the provisions of Indian Penal Code or any other law under which the accused could be punished for the offence alleged, scope and jurisdiction of the Magistrate exercising the power under the provisions of Domestic Violence Act is

entirely different and distinct. If allegation of offence punishable under the provisions of Indian Penal Code is alleged in proceedings under the provisions of the Domestic Violence Act, question is, as to whether the Magistrate exercising power under the provisions of the Domestic Violence Act could try the offence one alleged in the complaint, whether the provisions of the said Act provides for punishing the accused. In this regard, it is useful to refer to the provisions of the Domestic Violence Act. Section 18 of the said Act confers power on the Magistrate to pass the protection order against the domestic violence, Section 19 provides for residence order. Section 20 provides for monetary benefits, Section 21 provides for custody of the child and Section 22 provides for compensation. All such main relief could be granted under Sections 18 to 22 of the said Act. None of the provisions of the said Act provides for trying the offence punishable under the provisions of Indian Penal Code or any other law. Proceedings under the provisions of the Domestic Violence Act are not meant to deal with the offences, even if such allegations are made. Therefore, though such allegation may amount to domestic violence, but the said proceedings cannot be termed as trial of the offence. Reading of Section 300 of Code of Criminal Procedure makes it clear that it deals with the person, who has been tried once by the competent Court having jurisdiction, which means if the Magistrate under the provisions of the Domestic Violence Act having jurisdiction to try an offence and having tried and the matter ended in conviction or acquittal, such person shall not be tried once again for same offence nor on the same set of facts for any other offence in other enactment. Admittedly, the Family Court has no power to try the offence punishable under Sections 376 or 498 (A) of Indian Penal Code, much less under the provisions of the Domestic Violence Act. Adjudication by competent Court to deal with such offence or any offence arising out of said allegations, even if the allegations are made in those proceedings, for want of jurisdiction, the Family Court cannot try the offence. Therefore, Section 300 of Cr.P.C. is not applicable to the case on hand. Admittedly, the proceedings under Domestic Violence Act are not initiated for any punishment for the offence alleged in the complaint, but it was only for protection and adjudication of the rights of the complainant and the proceedings are entirely distinct and separate, which has nothing to do with the offence under Indian Penal Code.

(3) Geeta Kapoor and another v. State of Hariyana and another reported in I.L.R. Punjab and Hariyana Page No.293, wherein considering the issue of double jeopardies held that, the Domestic Violence Act is a social welfare legislation and the proceedings has to be construed as civil in nature. As far as reliefs are concerned, only if reliefs ordered are not obeyed, provision comes into make proceedings as criminal. But the proceedings under Section 498-A IPC are of criminal in nature because it is an offence under the Indian Penal Code, on which procedure under the Code of Criminal Procedure and the Indian Evidence Act is applicable. Under Section 498-A IPC only punishment provided under the Code is awarded to the offender. In a complaint under the D.V.Act, the rights of a woman granted under various statutes are protected and implemented. A woman need

not file different cases for various reliefs such as custody of children, maintenance, right of residence etc. but she can claim different reliefs by filing proceedings under the D.V.Act. So, both the cases are of different nature and have no bearing upon each other. However, a Magistrate in proceedings under the D.V.Act, can also add Section 498-A IPC in order to inflict punishment upon the offender. The proceedings under the D.V.Act, are of summoning nature and immediate relief is to be granted to a victim. The main object of the D.V.Act, is to provide protection to a helpless woman so that she is not ousted from the husband''s house or she is compelled to leave her in-laws house by the Acts of her in-laws'' family members. Besides, allowing shelter in her in- laws house, she is also granted financial support from the coffer of her husband, but it is not provided under Section 498-A of the Code. So, keeping in view the intention of our law framers, it is held that both proceedings are of different nature and can be filed separately. In this case the proceedings under the D.V Act, can continue on the same set of facts of a case under Section 406, 498-A Indian Penal Code.

12. Whereas, the petitioner is relying upon the following decision :

(1) Vijay Varma v. State of N.C.T. in Criminal Miscellaneous Case No.3878/09 dated 13th August, 2010 by Delhi High Court, wherein relying upon para 6 and 7, it is submitted that, when petitioner had settled in a separate house in America and when her passport was issued in America and when she is doing job in America and when she was able to take care of herself and make her own decision and thereby, decided to live in America, an application under section 12 of the Domestic Violence Act is nothing but gross misuse of the Act and therefore, confirming denial of interim relief of residence in property left by her father, because she has already filed the suit for partition. However there is no such situation in the present case and therefore, this judgment is not helpful to the petitioner.

(2) Harbandas Malik v. Payal Malik in judgment dated 29th July, 2012 in Criminal Revision Petition No.253/10, wherein Delhi High Court has held that, wife is not entitled to relief under the Domestic Violence Act but wherein also the peculiar facts are so different that husband and wife were living together in New Jersy, U.S.A. for more than seven years and the court of New Jersy granted divorce and therefore, Delhi High Court has held that, thereafter, when wife continued to stay with her husband in New Jersy, it cannot be said that, domestic relationship is continued either at New Jersy or at Panipat in India and therefore, the application under the Domestic Violence Act in India cannot be entertained against in-laws. Therefore also, when there is no such situation in the present case, this judgment would not help the petitioner.

(3) Swapnil Kolle v. Kirti Kolle reported in 14 (3) DMC 661, wherein Madhya pradesh High Court has quashed the complaint but again on particular facts of that case, wherein wife was residing separately for 13 months and therefore, no domestic relation was considered to be subsisting and petitioners before the High Court were practically maternal uncle, aunt and other relatives who never lived

with the wife and therefore, they do not have any domestic relationship with the wife. Thus, when peculiar facts are altogether different, this judgment would also not help the petitioner.

(4) Sharda Bhimji Kalani v. Kuntal Kalpeshkumar Kalani reported in 11 SCC Online Gujarat Page 3906 that is decision dated 27th July, 2011 in Criminal Miscellaneous Application No.1005/11, wherein there was a subsequent application under the Domestic Violence Act and when in previous application, wife has not alleged anything against uncle-in-law and aunt-in-law and their relatives, the High Court has quashed the complaint qua such relative only but, it is to be noted that for petitioner nos.1, 2 and 3, the petitioner has withdrawn the petition and therefore, when factual details are altogether different, this judgment would not help the petitioner.

(5) Kola Veera Raghav Rao v. Gorantla Venkateswara Rao and Anr. Reported as i.e. Criminal Appeal No.1160/2006, wherein the Hon''ble Supreme Court has vide judgment dated 1st February, 2011 while dealing with section 300 of the Code of Criminal Procedure set-aside the judgment of the High Court when one complaint under section 420 of the Indian Penal Code already decided by the Court contending that thereafter, the complaint under section 138 of the Negotiable Instrument Act cannot be filed. However, this is a small judgment though by the Hon''ble Supreme Court and when there is no disclosure of material facts and details, it cannot be considered as a reportable judgment, but it can be considered as a judgment in rem, however the subject is well considered by the Hon''ble Supreme Court itself in the case of Sangitaben (Supra) which is decided on 23rd April, 2012 and wherein, in fact, this judgment has been considered in para 36, but even after the different view is taken after considering as many as 33 other judgments and therefore, now though this judgment has not been declared as overruled, practically it has no force and therefore, it would not help the petitioner.

13. Thus, the law on the subject is now well-settled that while considering the discharge application, the Court is required to evaluate the material and documents on record for limited purpose i.e. to find out that whether facts emerged from such material even if taken on their face value, is enough and disclosing the existence of all the ingredients to constitute the alleged. The Court may, for this limited purpose, sift the evidence as it cannot be expected at such initial stage to accept all that the prosecution story as gospel truth even if it is opposed to commonsense or the broad probabilities of the case. Therefore, at the stage of framing of the charge, the Court has to consider the material with a view to find out if there is ground for presuming that the accused or the respondent has committed the offence or acts which gives rise to cause of action for initiating such proceedings or that there is no sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

14. I have gone through the record of the case and I am of the opinion that

there is sufficient evidence on record to prove the case of the prosecution, whereas explanation by the accused is not trust worthy, since not supported by the evidence less prima facie proof. It cannot be ignored that this is a premature stage to allow the petitioner to adduce evidence in any form at this stage, for the purpose reference of the case of State of Orissa v. Debendranath Padhi is necessary.

15. I have scrutinised the prima facie evidence on record which categorically proves the involvement of the accused in commission of crime and that there is prima facie evidence against him for framing the charges, hence the revision deserves to be dismissed.

16. In view of the above facts and circumstances, it cannot be ignored that, by and large, this petition against an order refusing to discharge the present petitioners from the proceedings under the Domestic Violence Act and therefore, when proceedings under section 12 of the Domestic Violence Act is though registered as a Criminal Case practically, it is not for convicting the respondent but for passing appropriate orders and reliefs in favour of the aggrieved person, and thereby when there is no scope of conviction, even if application under section 12 is allowed as prayed for, there is no reason or scope for discharge or even dropping of proceedings at initial or interim stage and therefore, there is no substance in the revision petition so as to interfere with in the impugned order and hence, the revision is dismissed.

Rule is discharged.

