
(2011) 03 BOM CK 0068
In the Bombay High Court
Case No : Writ Petition No. 576 of 2011

Mr. Ishpal Singh Kahai

APPELLANT

Vs

Mrs. Ramanjeet Kahai

RESPONDENT

Date of Decision : 23-03-2011

Acts Referred:

Domestic Violence and Matrimonial Proceedings Act, 1976 — Section 1, 1(1), 1(10), 1(2), 1(3)

Protection of Women From Domestic Violence Act, 2005 — Section 17(1), 2, 26, 3

Citation : (2011) 3 ALLMR 353 : (2011) 4 BomCR 656 : (2011) 113 BOMLR 1234 : (2011) 3 CivCC 746 : (2011) 2 DMC 250 : (2011) 3 MhLj 849 : (2011) 3 RCR(Civil) 704 : (2011) 3 RCR(Civil) 704 : (2011) 3 RCR(Criminal) 474 : (2011) 3 RCR(Criminal) 474

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : U.P. Warunjikar, for the Appellant; Harihar Bhawe, for the Respondent

Final Decision : Dismissed

Judgement

Roshan Dalvi, J.—The Petitioner/husband has challenged the order of the learned Judge, Family Court, Mumbai, directing him to remove himself from the residential flat in which he resides being flat No. 2102, 21st floor, Beverly Hills, Shastri Nagar, Lokhandwala Complex, Andheri (West), Mumbai (the suit flat) and from creating nuisance by attempting to enter in the suit flat until the hearing and final disposal of the Petition. The Respondent/wife sued the Petitioner/husband for divorce and other incidental reliefs, being inter alia a mandatory order directing her husband to remove himself, from entering into the suit flat and disturbing her possession. She applied for temporary injunction for the aforesaid reliefs in which the impugned order came to be passed.

2. Though the Petition is not expressly stated to be filed under the provisions of the Protection of women against Domestic Violence Act (DV Act), the substantial interim reliefs are available to the wife under it and it is gratifying to note that the learned Judge has impliedly treated the interim application as one also under

the DV Act and granted reliefs.

3. The wife's essential case is that her husband is an inveterate and consummate alcoholic. She has lodged several complaints with Versova Police Station. It is her case that her husband displays uncontrolled aggression due to excessive consumption of alcohol and abuses her and her children. The relief of injunction claimed by her is essentially upon the domestic violence caused to her by her husband's behaviour which makes it impossible for her to continue to reside in the matrimonial home with her children if her husband continues to live there as before. She, therefore, claims protection against domestic violence, a statutory right granted to women under DV Act.

4. Though only the relief of prohibitory injunction against disturbance of possession has been granted to wives, as in the case of B.P. Achala Anand Vs. S. Appi Reddy and Another, , since prior to the enactment of the DV Act, in this case the wife has claimed and been granted the injunction against the entry of the husband in the matrimonial home. She has made out a case that her husband is a habitual alcoholic, unable to improve or withdraw from the symptoms of alcohol constituting domestic violence and entitling her and her children to the relief of protection from such onslaught in the matrimonial home under the impugned residence order. She must, therefore, show prima facie the case of alcoholism as would constitute domestic violence. Her case must be appreciated to see whether she would be entitled to the injunctions sought.

5. Aside from her oral statement as also her criminal complaint, which would be tested in trial, she has relied upon and produced the case papers of her husband of Holy Spirit Hospital, Mahakali Caves Road, Andheri (East), Mumbai-400 093, where he was hospitalised for treatment of alcohol dependence. The documentary evidence shown by her is not disputed as incorrect and untruthful. It shows the husband being hospitalised on 5th December 2007 under the treatment of Dr. Prabhu and Dr. Rai. The case papers show alcoholic dependence since 15-20 years. It shows that the husband drinks in the morning as well as in the evening, as shown by the expression:

Morn drinks + Eve drinks, concomitant smoking on going and aggravating stressors etc.

His case history shows two attempts at abstinence 9 years prior to the hospitalisation after father's death, after which he returned to alcoholism. The conclusion of the case history shows

Imp: Alcohol dependence in withdrawal.

It advises urgent admission to hospital. Hence started the treatment of the phase of retoxification.

6. This documentary evidence corroborates the case of the wife that the husband is abusive and violative. Judicial notice is required to be taken of the fact that persistent alcoholic husbands are invariably violative.

7. The wife has given an instance of the after effects of the husband's alcoholism. The instance is also admitted by the husband. He has justified it on the ground that it was his mistake. The incident took place in the evening of 10th January 2010. The husband had been to Juhu Club. The wife and children were not at home. He consumed alcohol and returned home with a food parcel. He heated it up on the cooking gas. He ate and went to sleep. He found somebody knocking on the door but did not get up. Fire brigade was called who broke open the door, entered the kitchen and closed the gas cylinder knob. The husband realised his mistake.

8. This shows that the case of the wife that the husband had left the cooking gas on in his alcoholic stupor when he collapsed to sleep leaving the gas on and requiring their neighbour one Mr. Tanna to call the fire brigade is not only correct but also accurate. The requirement of calling the fire brigade shows the gravity of the situation. The wife was not in the house. She had to be called. Therefore, it stands to reason that despite knocking and banging the door, the Respondent was unable to bring himself to open it requiring the fire brigade to break it down.

9. It is in this situation that the statutory rights of protection of a wife in her matrimonial home under the DV Act are required to be considered.

10. It is the contention of the husband that the wife is not the full and complete owner of the flat in which he also resides and hence could not be granted the relief of injunction against him. The entire case of the husband is based upon ownership rights. Incidentally, in this case, the matrimonial home, in which the parties reside and for which the wife has applied for injunction, temporary as well as permanent, is in the name of the wife and her mother-in-law. That is, however, the most immaterial and even redundant consideration. Human Rights of the person of a wife has little to do with her ownership rights in property. It is, therefore, not material to consider in whose name the matrimonial home stands. What has to be only considered and appreciated in a case of domestic violence of a wife of an alcoholic and abusive husband is the protection against such violence.

11. It is in this light that the evolution of the law of Domestic Violence has to be considered.

12. At common law in England a mere desertion of a wife entitled her to peaceable occupation of and protection in the matrimonial home. This was held to fall within the doctrine of The Deserted Wife's Equity in the case of *National Provincial Bank Ltd. v. Hastings Car Mart Ltd. and Ors.* (1964) 1 Ch. D. 665.

13. The Matrimonial Homes Act, 1967 granted the right to both the spouses to enter into and occupy the matrimonial home and in certain cases to have the other spouse's right to live there terminated despite the fact that she/he did own, fully or partly, the matrimonial home. The right was, therefore, available irrespective of the title to the house.

14. In the case of *Gurasz v. Gurasz* (1969) 3 WLR 482 CA ; (1969) 3 AER 822, Lord Denning, as he then was considered the case of the wife who was a joint owner with her husband. Holding that the right to protection of her occupation extended to a wife who was also a part owner of the house, (though her husband was also a part owner in that case), he restrained the husband, who caused cruelty upon her, from the occupation rights thus:

It is true, of course, that the husband is also a joint owner, and by virtue thereof, the husband has a right to occupy it. But that is a right which the courts, for the protection of the wife, can restrict; just as it can restrict this right if he were the sole owner. Such a power to restrict arises out of her personal right, as a wife, to occupy the house. If his conduct is so outrageous as to make it impossible for them to live together, the court can restrain him from using the house even though he is a joint owner.

15. Hence the precedent law in England held that financial interest of a husband has nothing to do with the equity of protecting a wife in cases of cruelty or abuse. Their respective contributions to the purchase of the house could be considered only in cases where the marriage broke up requiring considerations of alimony and provisions for residence.

16. The right of a battered wife was statutorily recognized under the Domestic Violence and Matrimonial Proceedings Act, 1976 (the said Act) in England.

The relevant provisions of the said Act show thus:

Under Section 1 of the said Act, an injunction could be issued (termed as a matrimonial injunction). The breach of the injunction empowered the Police to arrest the violator.

Under Section 1(1) of the said Act, an injunction could be issued restraining the other party from molesting the Applicant or her children as also from excluding the other party from the matrimonial home or any part thereof and from permitting the Applicant to enter into the matrimonial home or any part thereof.

Under Section 2 of the said Act, where an injunction restraining violence or excluding the other party is issued and bodily harm is caused to the Applicant or the child a power of arrest would be attached to the injunction so as to empower a constable to arrest without warrant the person reasonably suspected of causing breach of injunction and further incidental orders could be passed.

Under Section 3 of the said Act, the order of regulating the exercise of the right of occupation by a spouse in the dwelling house as granted u/s 1 (2) of the Matrimonial Homes Act, 1967 came to be substituted by the order of prohibiting, suspending or restricting such a right. Further the positive permission to exercise the right of occupation by the Applicant came to be specifically granted by incorporation of that right.

Under Section 4 of the Act, in the case of spouses, who are joint owners of the

matrimonial home, the right to occupy it or to prohibit, suspend or restrict the other party could be granted by an order of the Court.

17. Hence the order of regulating the exercise of the right of occupation by a spouse in the dwelling house under common law came to be substituted by the order of prohibiting, suspending or restricting such a right. Further the permissive right of occupation by the Applicant came to be specifically granted by incorporation of that right.

18. The Matrimonial Homes Act, 1967 was repealed by the Matrimonial Homes Act, 1983 (M.H. Act) brought into force from 9th May 1983.

19. The 1983 Act dealt with the consolidation of the rights of a husband or wife to occupy a dwelling house which was their matrimonial home. Section 1 (1), (2), (3), (4) and (10) determined the statutory rights along with Section 9 thereof.

Under Section 1 (1) where one spouse was entitled to occupy a dwelling house by virtue of a beneficial estate, interest or contract or an enactment and the other spouse was not so entitled, then such other spouse would have a right of occupation. Under that right of occupation, he or she had a right not to be evicted or excluded therefrom and had a right to enter upon and occupy it.

Under Section 1(2) either spouse may apply for declaring, enforcing, restricting or terminating those rights, or for prohibiting, suspending, or restricting the right of the other.

Under Section 1(3), the Court could make any just and reasonable order having regard to the conduct of the spouses, the respective needs, financial resources and the needs of their children in that behalf as also to make periodical payments to the other spouse in respect of such occupation and for repayment and maintenance of the dwelling house.

Under Section 1(4), such order would remain in force for a specified period or until further orders.

Under Section 1 (10), the Act would have no application to any dwelling house which was not the dwelling house of the spouses. The spouse's rights of occupation would continue until the marriage subsisted.

Under Section 9 (1) of the Act, where any spouse has the right of occupation in a matrimonial home, he or she could apply for an order prohibiting, suspending or restricting the exercise of the right by the other or requiring the other spouse to permit its exercise by the Applicant. u/s 9 (3), if the spouse had a right under a contract or an enactment to remain in occupation of the dwelling house, Section 9 would apply where they would be entitled by virtue of the legal estate vested in them jointly.

20. Hence in terms, the new legislation conferred a complete right of occupation to both the spouses to remain in their matrimonial home peaceably and without

disturbance by the other. This was despite any other contractual or statutory right and also when they were joint owners. The Parliament, therefore, granted by law what Lord Denning ruled in the case of Gurasz (*supra*) since overturned by the House of Lords.

21. The Law in India developed much the same. Title of parties was oft considered in grant or refusal of the relief of injunction against an abusive husband.

22. The DV Act came to be enacted essentially to grant statutory protection to victims of violence in the domestic sector who had no proprietary rights so that the civil law protection could not be availed by them.

23. The DV Act is an Act 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.

The relevant portion of the objects and reasons of the Act *inter alia* provides for:

(i)...

(ii)...

(iii) It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the Respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

(v)

The Act, therefore, provides for security and protection of a wife irrespective of her proprietary rights in her residence. It aims at protecting the wife against violence and at prevention of recurrence of acts of violence.

24. u/s 2(s) of the DV Act, shared household is a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or alongwith the Respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the Respondent, or owned or tenanted by either of them in respect of which either the aggrieved person OR the Respondent or both jointly OR singly have any right, title, interest OR equity and includes such a household which may belong to the joint family of which the

Respondent is a member, irrespective of whether the Respondent or the aggrieved person has any right, title or interest in the shared household.

25. Her right to reside in the shared household is u/s 17(1) of the DV Act which runs 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. The statute, therefore, expressly excludes the consideration of ownership rights as a condition for determining whether or not a particular property is a shared household.

26. The DV Act grants protection to women in a shared household (or matrimonial home) in case of any domestic violence perpetrated upon her therein.

27. Under the relevant portion of Section 3 of the DV Act, domestic violence is defined inter alia as the omission or commission or conduct of the Respondent which:

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b). . .

(c). . .

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Under Explanation I to Section 3, physical abuse is any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force.

Under Explanation II to Section 3 for determining the commission of an act constituting domestic violence the overall facts and circumstances of taken into consideration.

The DV Act thus grants protection against any form of aggression mental, physical, or emotional in a shared household which may not belong to the woman who is a victim of violence therein, but who only resides therein WITHOUT having any title thereto.

28. A wife who owns a property can even otherwise exclude any person, including her abusive or violative husband therein under civil law. The enactment of the DV Act would not be required to give such a wife any added protection by way of any

injunctive relief in respect of a residential property owned by her. The DV Act steps in to protect the women who were otherwise left unprotected under the general law. This is expressly clarified under:

(1) the statement of objects and reasons:

...whether or not she has any title or rights in such home or household.

(2) the definition of shared household u/s 2(s):

whether owned or tenanted either jointly by the aggrieved person and the Respondent, or owned or tenanted by either of them.

(3) the right to reside in the shared household u/s 17:

whether or not she has any right, title or beneficial interest in the same.

as also

(4) the residence order u/s 19(1)(a):

whether or not the Respondent has a legal or equitable interest in the shared household

29. It can, therefore, be seen that there is no place for proprietary rights under the DV Act. The Act is an extension of the deeper and profounder principle of Women's Rights as a part of Human Rights. The matrimonial home or the shared household of a person does not require it to be owned or co-owned by the person who has been violated. It could be any household whether owned or tenanted, either jointly or by either of them as specifically set out in Section 2(s) above. It is the household in which the victim and the violator may be having rights, singly or jointly. Consequently, they may or may not have title to the property and hence the victim can apply for a residence order to the Court in respect of a shared household, which includes their matrimonial home, whether or not she has any right, title or beneficial interest therein. The very consideration of ownership rights would put materialism before matrimony.

30. In fact, the lesser the entitlement to property rights, the more is the entitlement to protection of human rights against violence. It may not be out of place to rethink the depth of the words of none other than Mahatma Gandhi reaching out to the most vulnerable of humankind in generic terms:

I hold that the more helpless a creature, the more entitled it is to protection by men, from the cruelty of men.

31. Though this law grants her protection, it goes only thus far and not without reason. It is essentially a temporary remedy. It is entirely a protectionist and not an empowering legislation. It holds fort until the parties work out their differences and disputes and until the husband makes the reasonable alternate arrangement contemplated in the legislation itself. Section 19(1)(f) which shall be considered presently. Consequently this law itself does not confer proprietary

rights in the matrimonial home. This law does not need/require her to have any title, because it does not confer upon her any title. It can, therefore, be seen why she requires to show the Court nothing more than her residential rights to the disputed premises which is her matrimonial home or the shared residence.

32. The case made out by either of the parties with regard to the joint or co-owned residence by the wife is, therefore, completely alien to the mischief that is sought to be remedied by the DV Act. The argument on behalf of the husband that his mother owns the suit flat along with wife etc. must, therefore, be ignored as redundant to the issues required to be adjudicated in this case.

33. The right is claimed by the lawfully wedded wife in this case. The husband, who subjects his wife to domestic violence in a marital relationship (as much as in any other domestic relationship), would require a protection as well as a residence order passed against him.

34. The wife applied for what is now statutorily called a residence order in terms of the injunctions, temporary as well as permanent, as set out above in respect of the shared household which is her matrimonial home. The residence orders claimed by her are grantable u/s 19(1) of the DV Act, the relevant portion of which runs thus:

19. Residence orders.

(1) While disposing of an application under Sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order-

(a) restraining the Respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the Respondent has a legal or equitable interest in the shared household;

(b) directing the Respondent to remove himself from the shared household;

(c) restraining the Respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the Respondent from alienating or disposing off the shared household or encumbering the same;

(e) ...

(f) directing the Respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) ...

(4) ...

(5) While passing an order under Sub-section (1), Sub-section (2) or Sub-section (3), the Court may also pass an order directing the officer-in-charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under Sub-section (1), the Magistrate may impose on the Respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

35. Hence notwithstanding the law relating to ownership of immovable property any victim of domestic violence in a domestic relationship would require to be granted the protective right of residence in the shared household, including the protection against dispossession therefrom whether or not she has any legal or equitable interest therein . This right to reside contains within itself not only an injunction for protection against her dispossession, but statutorily follows as a matter of corollary, the order of injunction of the Court for removal of the violator from such household and thereafter restraining him from entering thereupon. The order of removal of the violator and an order of injunction restraining him from entering upon the shared household is, therefore, conditioned upon his abusive behaviour violating the person of his wife or any other woman in domestic relationship and not upon his proprietary rights therein. Consequently, the right to reside without having any title to the property contains within itself the right to reside peaceably and to the exclusion of the violator. Further since the Act puts the woman s personal rights above proprietary interest, even if the Respondent who is the violator has title to the property, he would be restrained by a Court from exercising unrestrained domain over his ownership property by an order of injunction restraining him from alienating or disposing of or encumbering the shared household or the matrimonial home in which the victim has been granted the right of peaceful residence for her protection. This further brings within its sway, the servants, agents, assigns, who may be the relatives of the violator since what cannot be done directly also cannot be allowed to be done indirectly. This, of course, would be until and subject to the violator securing the same level of alternate accommodation for the victim as was enjoyed by her in the shared household and upon he paying for the same.

Consequently, reading Sub-sections (a), (b), (c), (d) and (f) of Section 19(1) together, a holistic view of the protection of the victim is granted under the beneficial social legislation which seeks to remedy the malaise of domestic violence in a domestic relationship.

36. It may be mentioned that the orders required to be passed by a Magistrate can also be passed by the Family Court, as the jurisdiction u/s 26 of the DV Act is conferred upon Civil Court, Family Court or Criminal Court alike.

37. It is this protection that the learned Judge has sought to grant the violated wife in this case against her violative husband. As aforesaid, the fact of his alcoholism not only having been shown, but admitted and justified and the instance shown by the wife not only having been stated, but substantiated by the fact of the fire brigade assistance having had to be sought, a case of her protection in future against the expected aftermath of the disease to which the husband has succumbed as well as for the protection of her minor children is more than prima facie made out. In fact, the learned Judge has considered the aggressive attitude of the husband in even breaking a glass in a fit of rage upon the Petitioner having filed the Petition and applied for reliefs. The learned Judge has also considered the police complaints filed by her. She has appreciated the apprehension in the mind of the wife of further disturbance at the hands of her husband. The learned Judge has, however, also considered the joint ownership of the wife and her mother-in-law in the matrimonial home. It may be mentioned that is the only immaterial aspect in considering the relief of injunctions granted by the learned Judge.

38. The wife has made out a fit case for grant of the reliefs sought by her. The husband has not shown any apparent error on the part of the learned Judge. No interference whatsoever is called for.

39. The Writ Petition is, therefore, dismissed and Rule is discharged accordingly.

40. However, upon the application on behalf of the Petitioner/husband, the stay already granted by the trial Court, which has been continued pending the Writ Petition, shall be continued for a further period of two weeks from today.