

(2013) 03 GUJ CK 0031
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 11623 of 2012

Parag Vasat Mewada and Others

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Citation : (2013) CriLJ 4635

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Dharmesh V. Shah, for the Appellant; G.M. Joshi, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—In present petition u/s 482 of the Code of Criminal Procedure (hereinafter referred to as the Code), the petitioners have prayed, inter alia, that:

7(A) Your Lordship be pleased to admit and allow this application and after perusing the complaint at Annexure-A, being Criminal Case No. 42 of 2012, pending in the Court of learned Judicial Magistrate First Class, Halvad, be pleased to pass an order for quashing and setting aside the same, in the interest of justice.

According to the petitioners, the Criminal Misc. Application No. 42 of 2012 filed under the provisions of Section 12 of the Domestic Violence Act, 2005 which is pending in the Court of Judicial Magistrate First Class, Halvad deserves to be and is required to be quashed.

2. The petitioners have claimed that the said Criminal Case has been instituted on incorrect and unjustified allegations. The petitioners No. 1 to 4, who are, respectively, the husband, father-in-law, brother-in-law and sister-in-law, have claimed that the petitioners Nos. 2 to 4 have been living separate from petitioner No. 1 and the complainant i.e. respondent No. 2 and that therefore the action of the respondent No. 2 of impleading the said petitioners as accused persons in the

Criminal Case is unjustified. The petitioner No. 1 husband has claimed that the allegations against him are baseless and unjustified. It is also alleged that the complainant i.e. respondent No. 2 has instituted the said criminal case with a view to harassing the petitioners and that the alleged incident has occurred outside India and therefore the learned Magistrate has no jurisdiction to entertain the complaint. That the family members have been unjustifiably arraigned as accused in the case. As regards the factual aspects related to marriage the petitioner has stated his version in para 2.1 and 2.2 which reads thus:

2.1. The applicants state and submit that the applicant No. 1 got married with the respondent No. 2 on 13.5.2003. Out of the said wedlock, they had son born on 5.8.2010. After the marriage, the applicant No. 1 and respondent No. 2 shifted to Mumbai and stayed there for 20 days and thereafter they had shifted to Dubai.

It is submitted that the applicant No. 2 is the father-in-law of the respondent No. 2 and Applicants No. 3 and 4 are the brother-in-law and sister-in-law (jet and jetani) of respondent No. 2. Both are residing at Mumbai. Whereas applicant No. 5 is the elder brother of the applicant No. 2 and has been residing separately at the address shown in the cause title.

All the applicants are the family members and have been arraigned as accused Nos. 1 to 5 in the application.

2.2. It is submitted that the respondent No. 2 went to Dubai to stay with her husband-applicant No. 1 in the year 2004 and had returned to Mumbai in the year 2005 thereafter every year both husband and wife came India regularly but no complaint filed by her. It is pertinent to mention at this stage that prior to that in the year 2008, Rs. 15,70,000/- was transferred from the accounts the applicant No. 1 and brother of the applicant No. 1 in her account since she required money.

3. The respondent No. 2 i.e. the complainant wife has opposed the petition. A reply affidavit has been filed stating, inter alia, that:

5. I respectfully state that the applicant No. 1 got married with the Respondent No. 2 on 13.5.2003 in Mumbai. The applicant No. 1 left for Dubai after 20 days and I, the respondent No. 2 stayed in Mumbai with the other applicants. It was only after a year that the respondent No. 2 travelled to Dubai for the first time on 23.06.2004. The fact that the respondent No. 2 was in India for a year after marriage can be culled out from the passport annexed with the complaint. The initial facts as stated by the applicants are untrue and misleading. This by itself is demonstrative of the false statements made by the applicant. I, the respondent No. 2 went to Dubai only in the year 2004, since I had studied for Diploma in Interior Design and had three years working experience as Interior Designer in Mumbai, in India before marriage, I started working in Dubai as Interior Designer. Copies of the Diploma certificate, appointment letter and various free

lance assignments that enabled me to start earning on my own are produced herewith and marked as Annexure-"AR-1" to this affidavit.

6. At this stage, I would like to bring to kind attention of Hon"ble Court the correct facts relating to the amount mentioned by the applicants in the application under reply. The case of the applicants is that the applicant family has transferred an amount of Rs. 15,70,000/- to me. I respectfully submit that this is a clear case of concealing facts from this Hon"ble Court with a view to gaining misplaced sympathy. The true facts are that my earnings were transferred by my husband to India to his family at Mumbai. The earnings accumulated in their bank accounts. The said amount of Rs. 15,11,800/- were returned to me by six cheques, copies of which are attached herewith and marked as Annexure-AR-2 Collective. This was a pure and simple matter of internal accounting, I had abstained from mentioning in complaint filed by me for the simple reason that same would not fall within the scope of domestic violence. I respectfully submit that I have mentioned only those facts amounting to domestic violence. Had it been my intention to mention all irrelevant facts simply to drag in the family members I could have mentioned the distorted facts which I have not done. Nonetheless, these facts require leading of evidence that can be done only in a trial.

7. I respectfully submit that the applicants have given weightage that the consent of the husband is required for working in Dubai which is incorrect. In fact, there are special provisions for married woman for working in Dubai. A copy of Labour Card issued by the Ministry of Labour of Government of U.A.E. is produced herewith and marked as Annexure-AR-3 to this affidavit which clearly states that I was allowed to work. Secondly, the applicant husband who was still trying his hand in different business required money which I was providing. In fact, it was the applicant husband who was always in need of the money and not me, the respondent No. 2. Even rent for vehicle parking and other household expenses were incurred by me from my earnings. In fact, the applicant husband wanted me the respondent No. 2 to work so that he can continue to get support from my earnings. Copies of the Bank Statements and the statements showing the payments of various credit cards would go to show the amounts spent by me. When I objected to this, the applicant husband, the applicant No. 1 tried to pay house rent from my earnings but he could not succeed because the house was rented in his name. Thirdly, the respondent No. 2 had also to manage for daily household items. Copies of Bank Statements and cheques are produced herewith and marked as Annexure-AR-4 collectively to this affidavit. It clearly transpires from the statements that it was me who was the earning members of the family who was incurring considerable expenditure for maintaining the household. It is also pertinent to note at this juncture that the applicant Nos. 3 and 4 were frequently visiting Dubai and during their stay they used to abuse and harass me in presence of the applicant husband. The interference in our married life by the applicant Nos. 3 and 4 had started way back in 2003 when I was staying at the marital home at Mumbai before going to Dubai. But I

tolerated the same hopefully thinking that the things would improve with time but as stated in the complaint, the things turned bad to worse with the passage of time.

8. I respectfully state and submit that the applicant husband was looking after my financial affairs. As the husband was in the need of money for his brother's business Parag Enterprises Fze, he had withdrawn 70,000/- dirhams from my account by getting signature on blank cheque. Counterfoils of the cheques showing the hand writings of the applicant husband and a copy of the bank statement are produced as annexure to this Affidavit. When this matter was discussed with the family of the applicants, he had assured to deposit the entire amount. Hence, I did not raise a grievance at the relevant time. Further, during the year 2010 I was expecting. Therefore, I proceeded on maternity leave. I was given maternity leave pay settlement by my employer. A copy of the maternity leave pay settlement issued to me is produced herewith and marked as Annexure-AR-5 to this affidavit. As the maternity allowance was a bearer cheque it was encashed by the applicant husband and the same amount was returned by the applicant husband on 12.06.2010 to me which the applicant husband is claiming to have been paid towards the transaction of 70,000 dirhams. In fact, none of the payments has any connection with the transaction of 70,000 dirhams which the applicant husband claims to have paid.

9. I respectfully state and submit that during the year June 2010 the applicants" No. 3 and 4 had shifted to Dubai and were staying together, with the applicant No. 1. I went to Dubai in December 2010 with my minor son. The applicant No. 3 and 4 had started abusing and harassing the respondent No. 2 mentally as well as physically. On complaining about the incidents of harassment, the applicant -- husband used to threaten me. I did not initiate any proceedings in a foreign land as I was all alone and genuinely felt a threat to my life.

4. The complainant has, in the reply affidavit, also given explanation as regards the petitioners" contention about delay in filing the complaint i.e. the criminal case.

5. Learned counsel for petitioner has reiterated the factual aspects and contentions stated in the petition. Learned counsel for petitioner assailed the action of respondent No. 2 of instituting case against family members of petitioner No. 1 wherein the father-in-law, brother-in-law and sister-in-law have been arraigned. It is contended that the said petitioners Nos. 2 to 4 have been staying separate from the petitioner No. 1 and his wife i.e. complainant. It is also contended that the allegations made by the complainant are vague and any specific allegations have not been made particularly against any petitioner and any specific role has not been attributed against any of the petitioners and therefore also the case deserves to be quashed at this stage. It is also alleged that the criminal case has been instituted as an afterthought and since the alleged incidents occurred outside India, the learned Magistrate does not have jurisdiction to entertain the criminal case. Learned counsel for petitioner made

reference of and relied on the decisions in case of B.S. Joshi and Others Vs. State of Haryana and Another, ADIL & Ors. v. State & Anr. (2011 (1) Cri CC 843), Harbans Lal Malik Vs. Payal Malik, Om Hemrajani Vs. State of U.P. and Another, , Mohammad Majeenuddin Ahmed and Others Vs. State of Andhra Pradesh and Another, K. Narasimhan Vs. Smt. Rohini Devanathan, and Surendran v. State of Kerala (2009 Law Suit (Ker) 900).

6. The learned APP has opposed the petition and submitted that the complaint/criminal case contains the details of the ill-treatment allegedly meted out to the complainant and that therefore the petitioners are not justified in claiming that any specific allegations are not made in the impugned case. Learned APP also submitted that the issue sought to be raised by the petitioners can be considered and decided by learned Magistrate who would, after hearing both sides and after taking into account the relevant provisions and evidence on record, pass appropriate order, however, it would not be proper or justified to quash and set aside the proceeding at its threshold.

7. The respondent No. 2 i.e. wife of petitioner No. 1 has filed the impugned proceedings under the provisions of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the Act").

7.1 On examination of the allegations made by the complainant i.e. present respondent, it emerges that it contains specific allegations about the acts of omission and commission amounting to alleged offence which appears to have been committed not only in Dubai but in India also.

7.2 The marriage between petitioner No. 1 and the complainant was solemnized in India and the petitioner No. 1 stayed for few days with the respondent - complainant in India and thereafter the petitioner No. 1 left for Dubai. It appears that the respondent No. 2 subsequently joined him at Dubai.

7.3 According to the allegations, the ill-treatment was being meted out to the complainant in India and the ill-treatment as well as physical, mental and emotional abuse continued at Dubai also.

7.4 On examination of details mentioned in the complaint it prima facie appears that specific allegations have been made against all accused persons and the details also shows that the complainant, as per the allegations, was ill-treated and abused in India as well as at Dubai by the accused persons.

7.5 In such circumstances and in view of such allegations, unless proper evidence is placed before the learned Magistrate about the time and place of alleged commission of offence, it is not possible, in absence of sufficient evidence, to hold that the proceedings of the impugned case are not maintainable in the Court of learned Magistrate where the case is instituted.

At this premature stage it would not be just to quash the proceedings even before sufficient evidence is placed before the learned Court.

It is pertinent that the Act provides sufficient safeguard against frivolous complaints inasmuch as the Act provides for requirement of report of protection officer and only after considering such report the Court can pass order. Therefore before such procedure is followed i.e. before protection officer's report is submitted and before it is examined by the learned Court, it would be premature to terminate the proceedings at its threshold.

7.6 So far as the allegations contained in the application filed under the Act are concerned, it emerges that the complainant has made specific allegations which concern or which touch not only the petitioner No. 1 but petitioners Nos. 2 to 4 as well. In the annexure/attachment to the application the complainant has mentioned the incidents which, according to the complainant, amount to alleged offence, and the details mentioned by the complainant certain specific allegations against the father-in-law, brother-in-law, sister-in-law as well.

7.7 Actually, in the said attachment-annexure the complainant i.e. respondent No. 2 has mentioned the details of the incidents under specific heads/titles viz.

- (a) ill-treatment to the complainant and her child by the petitioners,
- (b) the ill-treatment by sister-in-law, ill-treatment by brother-in-law,
- (c) ill-treatment by father-in-law and
- (d) ill-treatment by elder brother-in-law of father-in-law, and that therefore it is not possible, at this stage, to hold that only vague allegations are made and any specific allegations are not made and/or any specific role of the petitioners is not alleged.

7.8 The correctness and veracity of the allegations and the details of the incidents mentioned in the complaint can be examined after sufficient evidence is placed on record. Sufficiency of evidence and quality and evidentiary value of evidence cannot be examined at this stage of a petition u/s 482 of the Code.

7.9 On perusal of the complaint and its attachment/annexure, it is neither possible to, nor it would be justified to, terminate and set aside the proceedings of the impugned criminal case, at this stage, i.e. even before the respondent - complainant can lead and place on record proper and sufficient evidence to justify and support her complaint.

7.10 The facts considered by the Hon'ble Apex Court and different High Courts in the above mentioned decisions on which the learned counsel for petitioners has placed reliance are substantially different from the set of facts in present case and that therefore the said decisions do not assist the petitioners to support the contention and/or to justify the request that the complaint may be quashed at its threshold and without further investigation.

7.11. The learned counsel for petitioner has, in light of said decisions, tried to contend that if the accused are staying separate from the complainant and/or from the complainant and her husband then that fact alone is sufficient to quash

the FIR/proceedings (i.e. in such circumstances the FIR/proceedings before the Court should be terminated) at threshold without conducting the trial i.e. even without allowing the complainant to lead evidence to prove otherwise.

7.12 However, the decisions on which the learned counsel for petitioner placed reliance, do not lay down, as inflexible ratio and rule, that if the accused are staying separate from the complainant and/or from the complainant and her husband then the FIR/proceedings before the Court should be terminated at threshold without conducting the trial i.e. even without allowing the complainant to lead evidence to prove otherwise if it is claimed that the accused stay separate from the complainant.

7.13 While it is true that the tendency of arraigning all family members in criminal case is unjustified and ought to be checked and if it is satisfactorily demonstrated that the other family members whose names are mentioned as accused are not staying together and have been unjustifiably implicated in the proceedings; then in that case, interference may be necessary as well as justified. However, the petitioners are not justified in construing the said observations in the above mentioned decisions on which reliance is placed by learned advocate for petitioner as inflexible rule applicable and binding in all facts and circumstances and direction that in all cases where the accused persons claim that they are staying separate and not with the complainant or her husband's family, the complaint should be quashed at its threshold without any further proceedings.

7.14 On examination of the facts of the said decisions, it emerges that the facts and circumstances of the cited decisions are different from the set of facts in present case.

7.15 In all cases it may not be possible and/or just and proper to mechanically quash the proceedings/FIR at its threshold and without further investigation or without allowing sufficient evidence to be brought on record and without examining such evidence, merely because the accused persons raise a defence that he/they are staying separate from the complainant. If such defence is raised at the outset immediately or without very short time after FIR or a case before learned Magistrate or Family Court is filed (to claim that the FIR/proceedings may be quashed) then in some a cases it may become necessary to ascertain, through the process of investigation or by allowing the complainant to lead evidence as to whether the accused persons have been staying separate from the date of marriage or very long time or they have started staying separate recently or whether the accused persons, being relatives (e.g. married sister-in-law or married brother-in-law, etc.), have been regularly or periodically visiting and staying at the place where complainant stays or there have been no interactions and/or visits etc.

8. While considering the petition u/s 482 claiming that the complaint may be quashed because most of the members of husband's family have been

implicated in the complaint/FIR, the Court has to be careful and at times it may become necessary for the Court to pierce through the claim of separate residence and examine the totality of facts.

9. Only process of investigation may bring out complete and relevant facts, after statements of the accused persons, neighbours or other relatives, etc. (as may be considered necessary in the facts of the case) are recorded by the Court.

10. The decision to allow such petition and terminate the complaint at its threshold without permitting the complainant to lead evidence in support of her claim and/or to disprove the claim of accused persons or without permitting the Investigating Officer to conclude the investigation and without considering the material which may become available on account of investigation process, may sometimes result into injustice to the complainant.

11. The Hon''ble Apex Court has, in the decision in case of Preeti Gupta and Another Vs. State of Jharkhand and Another, observed that:

17. The powers possessed by the High Court u/s 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution but court''s failing to use the power for advancement of justice can also lead to grave injustice. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

26. We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

27. Admittedly, appellant No. 1 is a permanent resident of Navsari, Surat, Gujarat and has been living with her husband for more than seven years. Similarly, appellant No. 2 is a permanent resident of Goregaon. Maharashtra. They have never visited the place where the alleged incident had taken place. They had never lived with respondent No. 2 and her husband. Their implication in the complaint is meant to harass and humiliate the husband''s relatives. This seems to be the only basis to file this complaint against the appellants. Permitting the complainant to pursue this complaint would be an abuse of the process of law.

(Emphasis supplied)

11.1 The observations and decision in the said case by the Hon''ble Apex Court is reached in light of the aforesaid clear finding and conclusion by the Hon''ble Apex Court, more particularly, the finding that the petitioners before the Hon''ble Apex Court had never visited the place where the alleged incident had taken place and had never lived with respondent No. 2 and her husband. After taking note of the said aspect the Hon''ble Apex Court has also observed in the said decision that:

33. The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

(Emphasis supplied)

11.2 In the abovementioned decision in case of Preeti Gupta and Another Vs. State of Jharkhand and Another, also the Hon''ble Apex Court has observed that the inherent power of High Court should not be exercised to stifle legitimate prosecution and the said power must be exercised with great caution and the High Court should normally refrain from giving prima facie decision in case where the facts are incomplete and hazy. The Hon''ble Apex Court has also observed that the object is to find out the truth and punish the guilty and protect the innocent. When present case is examined in light of the said observations by the Hon''ble Apex Court it appears from the facts of present case and in light of the allegations made by the complainant that it would be premature for this Court to terminate, at this stage, the entire proceedings of the case pending before the learned trial Court and it would not be just and proper to deprive the complainant from placing evidence before the learned trial Court who can effectively consider such evidence and pass appropriate order thereafter.

12. In present case, though at first blush it may appear that the petitioner Nos. 2 to 4 are not staying with the petitioner No. 1 and the complainant and the residential addresses are different, on reading the details of the incidents alleged in the complaint, it appears that before the petitioner No. 1 went to Dubai followed by the complainant, the petitioners and the complainant were staying together and thereafter also the visits and interactions had continued.

13. From the facts of the case it appears that only after sufficient evidence is placed on record it can be ascertained as to whether there was no contact between the petitioner Nos. 2 to 4 and the complainant and there is no possibility of alleged involvement of the said petitioners in alleged ill-treatment to the complainant.

13.1. Another important aspect is that under the Act a filter is provided. Section 12 of the Act provides, inter alia, that Court would pass "order" after considering report of protection officer. Thus if protection officer's report does not support the complaint then the complainant would fail. Therefore, order quashing the complaint before such procedure would be premature and unjustified.

14. In facts of the case it appears that at this stage it would be premature for this Court to accept the petitioners' claim and defence and to record a conclusion that there is no possibility of any type of involvement of the said petitioners in alleged ill-treatment to the complainant and that therefore the proceedings of the impugned case should be quashed and terminated at its threshold.

15. In the facts and circumstances of the case and upon prima facie consideration of the details about the alleged ill-treatment to the complainant and the other aspects mentioned in the complaint by the respondent No. 2 wife, it does not appear justified to accept the petitioners' request in present petition and to terminate the proceedings before the learned trial Court gets opportunity to allow the evidence to come on record and before the evidence is examined so as to reach just and proper conclusion on the basis of such evidence. The petitioners have failed to make out any case for interference at this stage. In view of this Court, the petition does not deserve to be entertained at this stage and is accordingly not entertained and is hereby disposed of.