
(2010) 10 BOM CK 0215
In the Bombay High Court
Case No : Writ Petition No. 6625 of 2010

Sabah Sami Khan

APPELLANT

Vs

Adnan Sami Khan

RESPONDENT

Date of Decision : 21-10-2010

Acts Referred:

Family Courts Act, 1984 — Section 9
Matrimonial Homes Act, 1967 — Section 1(1), 1(10)
Protection of Women From Domestic Violence Act, 2005 — Section 12, 12(1), 17, 18, 19

Citation : (2011) 1 ALLMR 841 : (2010) 6 BomCR 719 : (2011) 3 KLT 11 (SN) : (2011) 1 MhLj 427

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Mahesh Jethmalani, Edith Dey and Mrunalini Deshmukh, for the Appellant; Vaibhav Krishna, instructed by Juris Consultes, for the Respondent

Judgement

Roshan Dalvi, J.—The Petitioner-wife has challenged a part of the order of the learned Judge, 2nd Family Court, Mumbai, dated 15th June 2010, in not restraining the Respondent-husband from entering upon the matrimonial home and in allowing him to reside therein wherein she has been allowed to reside. Consequently, both the Petitioner-wife and the Respondent-husband have been allowed to reside in the matrimonial home.

2. The parties admittedly have a large matrimonial home as also other residential flats and an earlier matrimonial home. The matrimonial home of the parties consists of 5 flats on the 13th and 14th floors of the building Oberoi Sky Garden, Lokhandawala Complex, Andheri, Mumbai in which both wife as well as husband have been allowed to reside under the import of the order of the Family Court. The parties have two flats on the 12th floor of the same building also. The parties have had another matrimonial home at 203, Ankita Apartments, Versova, Mumbai.

3. The parties have been unable to live together. The husband has remarried. His second wife lives with him in the matrimonial home. The husband was an alcoholic. He has denied that he continues to be so. The wife alleges that the husband continues to be an alcoholic. He has entered into a unique agreement with his wife, assuring and promising his rehabilitation as an alcoholic. The wife claims that despite the assurances, he failed to do so and a month after entering into the agreement, she was constrained to leave the matrimonial home. This was prior to his second marriage.

4. The husband contends that he was forced to enter into the said agreement assuring his rehabilitation because his father was to come from Pakistan to live with him in his matrimonial home which would have been allowed by his wife only if he signed such an agreement.

5. There would have been a little need for a husband who was never an alcoholic to enter into such an agreement. The husband could have promised the wife any other thing to allow his father to reside in the matrimonial home with them. In view of the fact that the parties have other residential premises, in the same building, the constraint on the part of the husband sought to be made out cannot even be prima facie accepted. The execution of this queer agreement at least, prima facie, shows the husband's alcoholic trait.

6. The husband has admittedly married another wife. She would be living in the same residential premises in which the Petitioner-wife has been allowed to live. The Petitioner-wife has complained of domestic violence. The violence complained of is both verbal and emotional. The case of domestic violence u/s 3 of the Protection of Women from Domestic Violence Act, 2005 (D.V. Act) is alleged. The relevant part of Section 3 of the D.V. Act runs thus:

3. Definition of domestic violence. For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

(a) harms or injures or endangers the health, safety, life, limb or wellbeing, 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) harasses, harms, injures or endangers the aggrieved person with a view to coerce her to any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in Clause (a) or Clause (b); or

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

Explanation I.- For the purposes of this section,-

(i) physical abuse means 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;

(ii) sexual abuse includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) verbal and emotional abuse includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) economic abuse includes

In this case the import of the impugned order would be that the Petitioner-wife would be constrained to live under one roof with her husband who is prone to alcohol and his second wife.

Hence the wife's case is sought to be made out u/s 3(a) and (d) of the D.V. Act.

7. It is contended on behalf of the Respondent-husband that the domestic incident report of a Protection Officer or a service provider u/s 12 of the D.V. Act has not been obtained and hence no case of domestic violence is made out. On this ground, it is argued on his behalf that no injunction restraining him from entering upon the matrimonial home is made out and hence the impugned order of the Family Court not granting any relief in that behalf and allowing the wife as well as the husband to continue to reside in the matrimonial home does not require any interference.

8. A domestic incident report is required to be prepared by a Protection Officer u/s 9 (1) (b) of the D.V. Act. This is contemplated in case of physical violence when complaint in that behalf is made or filed. The Protection Officer, in such a case, functions u/s 9 (1) (a) of the D.V. Act. The injuries caused to the aggrieved person are required to be documented. Consequently, a report in that behalf would be required to be seen by the Magistrate who may be called upon to ultimately determine and consider the application after some time when it reaches hearing. At such time, no evidence of any injuries etc. may be shown to the Magistrate except under the report of the Protection Officer. Consequently, the said provision is an enabling provision. Such a report cannot be made in case of any application alleging Domestic Violence which may be other than physical violence e.g. Verbal or emotional abuse. An application made under Sections 18 and 19 of the D.V. Act may have to be considered based upon the facts of each case and not necessarily with the aid and assistance of any Protection Officer or Service Provider. It may be required to be considered only upon the application made to the Court by the aggrieved person herself. In such a case no domestic

incident report may be filed or may be necessitated. This is one such case.

9. Both the wife and the husband claim title to the matrimonial home which was admittedly their shared residence. Purchase of the 5 flats on the 13th and 14th floors of the aforesaid building, forming one duplex flat, initially by the husband is admitted. An execution of the Deed of Gift by the husband to the wife gifting the said flats to her is also admitted. The transfer of the immovable property is complete upon execution of the Deed of Gift. The husband claims revocation of the gift unilaterally made by him to reclaim the title to the said property. The wife has challenged such unilateral revocation. The claim of the respective parties to the title of the premises can be decided only in a Civil Court.

10. The application before the Family Court and in this Petition relates only to the right of occupation of the wife. She has been allowed to occupy that as a shared residence, being admittedly her matrimonial home. It is the home in which the husband continues to reside, after the marriage between the parties broke down, with his second wife. It is only under these admitted circumstances that the wife's right to occupation is required to be adjudicated.

11. The moot question is whether a wife can be allowed or made to live in a house occupied by a husband who is either an alcoholic or who at least admittedly was earlier an alcoholic and with his second wife.

12. It is common knowledge, and of which judicial notice would be required to be taken, that once an alcoholic, is always an alcoholic except if such an alcoholic shows his withdrawal and rehabilitation. In this case, under the aforesaid strange agreement, the husband has accepted that he was an alcoholic and assured and promised the wife that he would reform himself. It is admitted that a month after the execution of the agreement the wife has left the matrimonial home and hence the link between the non- performance of the promise under the agreement and the consequent action of the wife is at least prima facie shown.

13. The husband is stated to be a singer and a musician. The order of the learned Judge of the Family Court shows that he has certain practice sessions of his music recitals in the said premises.

14. Admittedly, the husband has married again. His second wife lives with him.

15. It is in these circumstances that the order allowing the wife to live in the said premises is resisted by the wife on the ground that in terms she is unable to enter upon her matrimonial home and to occupy, use and enjoy it peaceably. She has, therefore, applied that the husband be directed to remove himself and be restrained from entering into such matrimonial home.

16. The act of the husband in living as aforesaid with the proverbial wine, wife and song is an illustration of an antithesis of an egalitarian matrimony. That the wife would be required to live under the same roof with her husband and his second wife is an oxymoron in itself. It clothes itself in the cliché of a woman being treated as a chattel; a wife being left to the vagaries of the emotional and

mental violence when a husband surrenders himself to his pleasures in which wife cannot and would not partake. This act itself falls squarely within the broad and inclusive definition of the domestic violence u/s 3(a) (d) of the D.V. Act.

17. If the husband can offer the wife no alternative accommodation to reside there peaceably, he would be required to be enjoined from living in such a matrimonial home with his second wife.

18. However, in this case, the parties are in easy circumstances. The wife, of course, does not live in a separate and alternate independent residential accommodation though it is alleged that she is in circumstances able to do so. She is stated to have been residing in a hotel for a good length of time. The parties, however, have an earlier matrimonial home and 2 other flats on the 12th floor of the same building.

19. It is contended on behalf of the wife that the husband can shift to the 12th floor flat. The husband has in turn offered 2 flats on the 12th floor to the wife for her separate and independent accommodation with all facilities and comforts in paragraph 6 of his Affidavit-in-reply filed in May 2009.

20. The parties being Muslims are governed by the Koran as the main source of Muslim Law considered along with the legislations of the country having jurisdiction, being the one in which they reside and where the dispute has arisen, which are within the spirit of such main source.

In the English translation of the Koran Part IV the chapter relating to women (Nisaaa) Verse 177 Sub-Sections 3 & 24 of Section 23 run thus:

3 marry the women who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captures) that your right hands possess. Thus it is more likely that ye will not do injustice:

24 And all married women (are forbidden) until you save those (captives) who in your right hands possess. It is a decree of Allah for you. Lawful unto you are all beyond those mentioned. So that ye seek them with your wealth in honest wedlock, not debauchery.

And those of whom ye seek content (by marrying them) give unto them their portions as a duty.

And there is no sin for you in what ye do by mutual agreement after the duty (hath been done).

Lo Allah is ever knower, wise.

(Underlining supplied)

21. The rights of parties to a marriage for occupation of the matrimonial home, and even of parties to any domestic relationship, has been initially considered under the common law in England. Various British legislations have crystallised the legal position of the parties in matrimony which has now been incorporated

in the D.V. Act. Section 1(2) of the Matrimonial Homes Act, 1967 in the U.K. came to be amended u/s 3 of the Domestic Violence and Matrimonial Proceedings Act, 1976. u/s 3 thereof the order of regulating the exercise of the right of occupation by a spouse in the dwelling house 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.

22. The Matrimonial Homes Act, 1967 was repealed by the Matrimonial Homes Act, 1983 (M.H. Act) brought into force from 9th May 1983. 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. u/s 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 or 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.

Under Section 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.

23. In India, the wife's right to reside in a shared household is u/s 17 of the Domestic Violence and Matrimonial Proceedings Act, 1976, for which orders u/s 19 thereof can be passed. Section 17 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.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law:

Section 17, therefore, gives the wife the right to reside in the matrimonial home. The wife cannot be evicted or excluded from such residence. She can be evicted or excluded only in accordance with the procedure established by law.

24. The learned Judge of the Family Court has granted the wife the right to reside in the matrimonial home of the parties which is on the 13th and 14th floors of the aforesaid building. The learned Judge has not evicted or excluded her or allowed her to be evicted or excluded therefrom under the impugned order. In view of the above circumstances, however, it would otherwise not constitute sufficient compliance of the specific statutory rights given to the wife to reside in the shared house. She is expected to reside there peaceably and without the intrusion of a second wife or the domestic violence otherwise caused by an errant husband.

25. However, the last part of Section 17(2) "save in accordance with the procedure established by law sets out the curtailment of the statutory right. A wife, therefore, may even be evicted or excluded from the matrimonial home, if the husband follows due legal process.

26. It has to be seen what the due procedure established by law constituting due legal process is. One such process is u/s 9 of the Family Courts Act, 1984 (FC Act).

27. The purpose and object for the enactment of the Family Courts Act was to promote conciliation and secure speedy settlement of disputes, relating to marriage and family affairs and matters connected therewith. These would include conciliation in a matter relating to the shared residence or the matrimonial home of the parties to a family dispute u/s 9 thereof, which is one of the procedures established by that law. The procedure of reconciliation of the parties by the conciliatory process in preference to the adjudicatory process is mandated. Section 9 runs thus:

9. Duty of Family Court to make efforts for settlement.-(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it

may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by Sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings:

This includes an effort at settlement even in cases relating to the shared residence or the matrimonial home of the parties for which protection or residence orders are claimed under Sections 18 and 19 of the D.V. Act if that is the subject-matter of the Petition before the Family Court. Various reliefs may be granted thereunder. This case relates to the application for a residence order u/s 19 of the D.V. Act. Section 19 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 into any portion of the shared household in which the aggrieved person resides;

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

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(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:

Under this section the wife's possession in her shared residence, which is her matrimonial home in this case, may be protected under Sub-sections (a) to (e). Alternatively, a residence may be provided for the wife under Sub-section (f) of Section 19 of the D.V. Act. The conciliatory process may reconcile the parties or may amicably bring to an end the matrimonial dispute even if the parties were not to continue in matrimony.

28. In an application for residence u/s 19 of the D.V. Act, an alternative premises being a residential home would be required to be provided to the aggrieved party u/s 19 (1) (f) thereof. If the spirit of the object of the FC Act and the procedure

u/s 9 of the FC Act is to be heeded, in such a case, a reasonable offer of an alternate accommodation made to the wife or the woman in a domestic relationship who requires a right to reside in a particular premises is to be considered and accepted. If such an offer is made and found reasonable so as to comply with Sub-section (f) of Section 19 of the D.V. Act, no order can or need be passed under Sub-Section 19(a)(b) or (c) thereof. Of course, an order under Sub-section (d) or (e) may be passed as circumstances require.

29. The husband has offered two flats on the 12th floor to the wife " with all facilities and comforts for her separate residence . Alternatively he has offered the wife their previous matrimonial home at flat No. 203, Versova Apartments, Andheri, Mumbai. Needless to state, these flats must be unencumbered and exclusively for the wife.

30. The right of the wife u/s 19 does not require to deal with the equality in distribution of the assets and properties of the husband. It is a protective legislation for an enabling purpose to allow a wife to reside exclusively and peaceably in such alternative premises which, of course, should be of the same level. Besides, since it would be unencumbered residence, exclusive for the wife, it would require to be about half the area of the shared residence of the parties.

31. Of course, granting the wife both the Versova flat and the two 12th floor flats in the same building would give her the most an equitable and almost equal half share of their shared residence or matrimonial home and may bring to a final end their dispute with regard thereto.

32. Though, therefore, the order allowing the wife to enter into the matrimonial home where the husband resides with his second wife (specially in view of the fact that he was, at least once, an alcoholic) would not meet the ends of justice, the offer of the husband for an unencumbered, exclusive, alternative premises would; it would be in compliance of the purport and import of this specific legislation. The wife would be entitled to reside peaceably in the two flats on the 12th floor of the same building or in their Versova flat to the exclusion of the husband, his servants and agents. Further her rights, if any, in the matrimonial home would have to be protected against alienation and encumbrance and renouncement of title by the Respondent-husband. Once such an offer is made and is seen to be a reasonable offer, the wife would not be entitled to insist upon residing in the shared household only and not be evicted or excluded therefrom.

33. Hence the following order:

ORDER

(i) The impugned order dated 15th June 2010 passed by the learned Judge, 2nd Family Court, Mumbai, requires to be modified.

(ii) The Respondent-husband's offer made in paragraph 6 of his Affidavit-in-reply filed in May 2009 to give the wife to reside in the two flats on the 12th floor of Oberoi Sky Garden, Lokhandawala Complex, Versova Andheri, Mumbai for her

separate residence or their flat at 203, Ankita Apartments, Versova, Andheri, Mumbai, is seen to be reasonable and, therefore, accepted.

(iii) The Petitioner-wife would be entitled to choose to reside in either of the aforesaid premises.

(iv) Upon such a choice being exercised by the wife, the husband shall allow the wife to enter upon, reside and remain in such premises without any encumbrances, disturbance and interference.

(v) The Petitioner-wife shall be entitled to enter upon and reside either in the two flats on the 12th floor of Oberoi Sky Garden, Lokhandawala Complex, Andheri, Mumbai or in their previous matrimonial home at 203, Ankita Apartments, Versova, Andheri, Mumbai to the exclusion of the husband, his relatives, servants and agents.

(vi) The husband and his relatives shall not enter upon or disturb the occupation, use and enjoyment of the Petitioner-wife in the aforesaid premises.

(vii) The Respondent-husband shall not sell, alienate, encumber or otherwise create any third party rights or renounce the title claimed by him in the flats on the 13th and 14th floors of Oberoi Sky Garden, Lokhandawala Complex, Andheri, Mumbai, until the final disposal of their matrimonial dispute.

(viii) Under these circumstances, prayers (b) and (c) are refused.

(ix) Rule is granted accordingly.

(x) No order as to costs.