

(2012) 07 KL CK 0129
In the High Court Of Kerala
Case No : F.A.O. No. 50 of 2012

Venugopalan Nair

APPELLANT

Vs

Jayasree V. Nair

RESPONDENT

Date of Decision : 17-07-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 21
Protection of Women From Domestic Violence Act, 2005 — Section 17, 18, 18, 19, 19
Specific Relief Act, 1963 — Section 41

Citation : (2012) 4 ILR (Ker) 640 : (2012) 3 KLJ 398 : (2012) 3 KLT 342 :
(2012) 4 RCR(Civil) 518

Hon'ble Judges : M.L. Joseph Francis, J;K.T. Sankaran, J

Bench : Division Bench

Advocate : S. Sreekumar SR., Sri. A. Balagopalan, Sri. A. Rajagopalan, Sri. M.S. Imthiyaz Ahammed and Sri. M.N. Manmadan, for the Appellant; A.C. Sankara Varma, for the Respondent

Judgement

K.T. Sankaran, J.—The order dated 1.2.2012 in I.A. No. 180 of 2012 in I.A. No. 171 of 2012 in O.P. No. 74 of 2012 on the file of the Family Court, Malappuram is under challenge in this appeal filed by the husband of the respondent. Hereinafter, the appellant is referred to as "the husband" and the respondent is referred to as Rs. the wife". In the marital relationship between the appellant and the respondent, two children were born. They were staying in the house situated in the property in the name of the husband. The wife has a case that the said property was purchased utilising her funds. The relationship between the husband and the wife became stained. There are allegations of assault and cruelty against each other. On 16.1.2012, the wife filed O.P. No. 61 of 2012 before the Family Court, Malappuram against the husband and others for realisation of money and ornaments belonging to the wife and which were allegedly misappropriated by the respondents. On an application filed by the wife, the immovable property belonging to the husband was attached before judgment. O.P. No. 61 of 2012 is pending. The attachment was effected on

17.1.2012. On 18.1.2012, the wife filed M.C. No. 25 of 2012 on the file of the Court of the Judicial Magistrate of the First Class, Malappuram against the husband claiming maintenance. In that M.C., on 18.1.2012 itself, the wife filed C.M.P. No. 298 of 2012 for granting a protection order as well as a residence order. Notice was served on the husband on 19.1.2012. The husband entered appearance on 21.1.2012 in M.C. No. 25 of 2012 as well as in C.M.P. No. 298 of 2012 and he prayed for time to file counter. He also raised a contention that an order of interim injunction was passed in his favour in O.P. No. 74 of 2012 on the file of the Family Court, Malappuram, restraining the wife from entering into the residential property.

2. O.P. No. 74 of 2012, Family Court, Malappuram was filed by the husband on 20.1.2012 against the wife and others for an injunction restraining them from trespassing upon the plaint schedule property or the house therein and from obstructing the husband from possessing and enjoying the said property. The property scheduled to the plaint is the residential property, in respect of which the order of residence was sought for by the wife in M.C. No. 25 of 2012. The Family Court granted an ad interim order of injunction in favour of the husband in O.P. No. 74 of 2012. The husband contended in C.M.P. No. 298 of 2012 that in view of the ad interim order of injunction granted by the Family Court, the learned Magistrate was not justified in granting the residence order. The learned Magistrate, by the order dated 28.1.2012 in C.M.P. No. 298 of 2012 (Annexure R5) held thus:

6. It is contended by the respondents that a temporary prohibition order of the Family Court is in force restraining the petitioner from entering into the shared house. Though no document was produced before me to that effect, Mr. A.C. Shankaravarma, the learned counsel for the petitioner fairly conceded in his submission that there is such an order in force. He submitted that a petition is being filed to get that order vacated. When an order passed by a Court of law having jurisdictional competence, restraining the petitioner from entering into the shared house is in force, it is not feasible and practicable to pass another order by me contrary to such existing order. Hence, I am not inclined to entertain the prayer of the petitioner to allow her to reside in the shared house. It is clarified that this finding will not fetter the petitioner from moving an application u/s 25(2) of the Act to this Court for appropriate legal remedy, on the basis of change of circumstances.

However, the learned Magistrate partly allowed the petition in favour of the children.

3. The wife filed I.A. No. 180 of 2012 in O.P. No. 74 of 2012 to vacate the order of interim injunction. The Family Court held that the husband suppressed the fact that an order of attachment was passed in O.P. No. 61 of 2012 and that the wife filed M.C. No. 25 of 2012 and C.M.P. No. 298 of 2012 in the Court of the Judicial Magistrate of the First Class, Malappuram. On the ground that the husband suppressed material facts before Court and he did not approach the Court with

clean hands, the Family Court vacated the interim order of injunction granted in O.P. No. 74 of 2012. The Family Court also held that the marital relationship being in subsistence, no injunction can be granted against the wife from entering into the house. The order passed by the Family Court vacating the order of injunction is under challenge in this appeal filed by the husband.

4. From the facts narrated above, it is fairly clear that the husband was aware of the order of attachment in O.P. No. 61 of 2012 and the filing of M.C. No. 25 of 2012 and C.M.P. No. 298 of 2012 by the wife. On 19.1.2012, the husband received notice in C.M.P. No. 298 of 2012 filed by the wife for a protection order and a residence order under the provisions of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as Rs. PWDV Act"). On the next day of receipt of notice, the husband filed O.P. No. 74 of 2012 before the Family Court against the wife and others for injunction and obtained an ad interim order of injunction. On the basis of the interim order of injunction granted by the Family Court, the learned Magistrate did not grant residence order in favour of the wife. From Annexure R5 order passed by the learned Magistrate, it is clear that the learned Magistrate would have granted a residence order in favour of the wife, but for the order of interim injunction granted by the Family Court in favour of the husband restraining the wife from entering into the house. Learned Magistrate also clarified in Annexure R5 order that the wife would be entitled to move an application u/s 25(2) of PWDV Act for modification of the order on the basis of change of circumstances.

5. The Parliament thought that domestic violence is undoubtedly a human rights issue and serious deterrent to development. Keeping pace with the recommendations of the United Nations Committee on Convention and Elimination of All forms of Discrimination Against Women (CEDAW), and being aware that the civil laws of the land do not address the phenomenon of domestic violence in its entirety, the Parliament enacted the PWDV Act. Keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution, the PWDV Act was enacted to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

6. Sub Section (1) of Section 17 of the PWDV Act provides that 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. In view of sub-section (2) of Section 17 of the PWDV Act, the wife (aggrieved person) shall not be evicted or excluded from the shared household or any part of it by the husband except in accordance with the procedure established by law. The right conferred on the wife u/s 17 of the PWDV Act cannot be defeated by granting an order of injunction restraining her from entering into the shared household. The Civil Court or Family Court could not grant such an injunction, so long as the right of the wife is either admitted or proved or not disputed. Even if a dispute arises as to the right of the wife in the shared household, normally, the

Courts would be reluctant to grant an injunction restraining the wife from entering into the house (the shared household) unless it is established that there is no domestic relationship or that the house in question is not a shared household. Section 26 of the PWDV Act provides that any relief available under Sections 18 (protection order), 19 (residence order), 20 (monetary reliefs), 21 (custody orders) and 22 (compensation orders) may also be sought for in any legal proceeding, before a Civil Court, Family Court or a Criminal Court. Any such relief may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a Civil or Criminal Court. Section 26 definitely indicates that the PWDV Act guarantees larger rights in favour of the wife. The nature of the proceedings pending between the parties is quite immaterial and the aggrieved person can seek any of the reliefs under Sections 18 to 22 in any such proceedings. Section 36 of PWDV Act, which provides that the provisions of the Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force, supports Section 17. The aforesaid conclusion is fortified by the decision of the Supreme Court in Vimalben Ajitbhai Patel Vs. Vatslabee Ashokbhai Patel and Others, , wherein it was held thus:

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

As held by the court below, the petitioner/husband suppressed material facts. Had it been mentioned in O.P. No. 74 of 2012 and the application for the temporary injunction that the wife had filed M.C. No. 25 of 2012 and an application under the PWDV Act, the Family Court would not have granted an order of ad interim injunction in favour of the husband. The right of the wife to get a residence order under the PWDV Act was seriously affected by the order of interim injunction granted in O.P. No. 74 of 2012 filed by the husband. The conduct of the plaintiff has been such as to disentitle him to the assistance to the Court, as provided under clause (i) to Section 41 of the Specific Relief Act. The court below was justified in allowing the application for vacating the order of injunction.

No interference is called for.

The FAO is, accordingly, dismissed with costs.