

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 2010

Date of Order: 20th September, 2010

+ CRL.M.C. 4159/2009, Cri. M.A. No. 14141/2009

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20.09.2010

ADIL & ORS.

..... Petitioner

Through: Mr. N.K. Handa, Adv.

Versus

STATE & ANR.

..... Respondent

Through Ms Rakhi Dubey, Adv. for R-2 along with
R-2 in person.

Mr Sunil Sharma, APP for the State

SI Beena Thakur, Investigating Officer

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. By this petition the petitioners have assailed orders dated 30th November, 2009, and 6th November, 2009, passed by learned Metropolitan Magistrate (MM).

2. Brief facts relevant for the purpose of deciding this petition are that the respondent Kaushar Bano was married to Zahid Khan, brother of the three petitioners on 16th March, 1994. Zahid Khan died on 14th November, 2002, at Delhi. After his death, Kaushar Bano filed an FIR on 26th July, 2003 against the petitioners and her mother-in-law and other relatives making various

allegations of cruelty, dowry demand etc. In this FIR, she gave her residence as House No. 5, Gali Masjidwali No. 1, Babarpur, Shahadara, Delhi – 32.

3. After coming into force of The Protection of Women from Domestic Violence Act (**in short Domestic Violence Act**), she filed an application under Section 12 of Domestic Violence Act on 6th August, 2007, and also made an application for interim relief under Section 23 of Domestic Violence Act seeking right of residence in the property where petitioners were living i.e. District Bulandshahar, U.P.

4. The Court of MM passed an order dated 19th April, 2008, observing that the property, in which right of residence was being sought by Kaushar Bano, was a property of her mother-in-law and cannot be termed as shared household. She, therefore, dismissed the application for interim relief and fixed the case for evidence giving an opportunity to prove the facts.

5. Against this order Kaushar Bano preferred an appeal before the learned Sessions Judge. Learned Additional Sessions Judge observed that the mother-in-law of Kaushar Bano i.e. mother of the present petitioners, expired on 4th June, 2008, and after her death, the question whether the property constituted shared house-hold would be required to be gone into by the MM again and the MM would determine if the appellant would be entitled to a relief in the changed circumstances since the property (matrimonial home) was indeed not in the name of any of the respondents i.e. the present petitioners, their mother having expired. She remanded back the matter to MM vide her order dated 27th November, 2008.

6. After the matter was remanded back, learned MM reconsidered the application under Section 23 of Domestic Violence Act and passed order dated 6th November, 2009 observing that respondent had a right to live in the property at Bulandshahar. It was brought to the notice of the MM that present petitioners have filed a civil suit in the Court of Civil Judge, S.D., Bulandshahar, U.P. in respect of same property, wherein wife Kaushar Bano was made as a respondent.

7. The learned MM allowed application of wife observing that vide order dated 19th April, 2008, the interim relief was refused to Kaushar Bano on the ground that house in Bulandshahar did not constitute a shared household as no document was on record to show that property was one in which the husband had a right or it was exclusive property of mother-in-law. She observed that, *prima facie*, the interim order was refused to Kaushar Bano on the ground that property belonged to mother-in-law, but the stand taken by the present petitioners was contrary to the reply filed by them later on where they had taken a stand that house in question belonged to their father and a settlement/Will was executed by him. She observed that since the earlier stand taken before the Court was that the property belonged to their mother and mother had expired *intestate*, deceased husband of Kaushar Bano being a son had a right in the property in question, hence the property can be termed as shared household. She, therefore, held that Kaushar Bano had a right of residence in the property in *Town Gulaothi, District Bulandshahar, U.P.*

8. Against this order, an appeal was preferred by the petitioners before the learned Additional Sessions Judge who observed that there was no infirmity in the order passed by the learned MM and the property could be termed as shared household within the definition as given in Section 2(s) Act. Vide order dated 30th November, 2009 the learned MM called upon the site plan of the property and she directed a portion of the property to be handed over to Kaushar Bano.

9. A perusal of the FIR dated 23rd July, 2003 lodged by Kaushar Bano against her in laws would show that her husband was a Doctor and had started practicing in Delhi, though the date of shifting to Delhi has been kept vague in the complaint. Her complaint also shows that birth of her first child, a female, had taken place at Bulandshahar on 23rd June, 1997, whereas male child Shahid was born on 22nd December, 1998 at House No. 5, Gali Masjidwali No. 1, Babarpur, Shahadara, Delhi-32. The complaint also gives an impression that her husband had separated from his other brothers sometime in 1998-1999, when she alleged that her dowry articles and *Istridhan* were misappropriated and she started residing at Delhi with her husband. Her husband died on 14th November, 2002 at Delhi. A perusal of directory of community of the petitioners, released by Delhi Government, shows that it contained the names of entire family members of Kaushar Bano, her husband and three children. The address given in the directory is A-5, Main Gali Masjid Wali, Babar Pur, Shahdara, Delhi-32. Her husband Zahid Khan has been shown as a Doctor and three children of couple namely Shahrukh, Heena and Sahil find mention in director. A perusal of Voters' List

of Babarpur of year 2003 would also show that names of Kaushar Bano and her husband appear in Voters' List of Babarpur. It appears couple had separated from rest of the family about 8 years before filing of application under the Protection of Women from Domestic Violence Act, 2005.

10. It is apparent from the perusal of the order of Trial Court and Appellate Court that both, the Trial Court and the Appellate Court mis-directed themselves and did not consider the relevant provision of the Domestic Violence Act. Under Domestic Violence Act, the first pre-condition is that the applicant must be an aggrieved person. Aggrieved person is a person defined in Section 2 (a) of the Act. The domestic relationship must be there between the aggrieved person and respondent to invoke Domestic Violence Act. This Court had clarified the legal position in respect of domestic relationship in *Vijay Verma Vs. State NCT of Delhi & Anr.*, Criminal Misc. No. 3878 of 2009 and observed as under:

"5. Filing of a petition under Protection of Women from Domestic Violence Act by the petitioner taking shelter of domestic relationship and domestic violence needs to be considered so that this Act is not misused to settle property disputes. Domestic relationship is defined under the Act in Section 2(f) as under:

"(f) 'domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

6. A perusal of this provision makes it clear that domestic relationship arises in respect of an aggrieved person if the aggrieved person had lived together with the respondent in a shared household. This living together can be either soon before filing of petition or 'at any point of time'. The problem arises with the meaning of phrase "at any point of time". Does that mean that living together at any stage in the past would give right to a person to become aggrieved person to claim domestic relationship? I consider that "at any point of time" under the Act only means where an aggrieved person has been continuously living in the shared household as a matter of right but for some reason the aggrieved person has to leave the house temporarily and when she returns, she is not allowed to enjoy her right to live in the property. However, "at any point of time" cannot be defined as "at any point of time in the past" whether the right to live survives or not. For example if there is a joint family where father has several sons with daughters-in-law living in a house and ultimately sons, one by one or together, decide that they should live separate with their own families and they establish separate household and start living with their respective families separately at different places; can it be said that wife of each of the sons can claim a right to live in the house of father-in-law because at one point of time she along with her husband had lived in the shared household. If this meaning is given to the shared household then the whole purpose of Domestic Violence Act shall stand defeated. Where a family member leaves the shared household to establish his own household, and actually establishes his own household, he cannot claim to have a right to move an application under Section 12 of Protection of Women from Domestic Violence Act on the basis of domestic relationship. Domestic relationship comes to an end once the son along with his family moved out of the joint family and established his own household or when a daughter gets married and establishes her own household with her husband. Such son, daughter, daughter-in-law, son-in-law, if they have any right in the property say because of coparcenary or because of inheritance, such right can be claimed by an independent civil suit and an application under Protection of Women from Domestic Violence Act cannot be filed by a person who has established his separate household and ceased to have a domestic relationship. Domestic relationship continues so long as the parties live under the same roof and enjoy living together in a shared household. Only a

compelled or temporarily going out by aggrieved person shall fall in phrase 'at any point of time', say, wife has gone to her parents house or to a relative or some other female member has gone to live with her some relative, and, all her articles and belongings remain within the same household and she has not left the household permanently, the domestic relationship continues. However, where the living together has been given up and a separate household is established and belongings are removed, domestic relationship comes to an end and a relationship of being relatives of each other survives. This is very normal in families that a person whether, a male or a female attains self sufficiency after education or otherwise and takes a job lives in some other city or country, enjoys life there, settles home there. He cannot be said to have domestic relationship with the persons whom he left behind. His relationship that of a brother and sister, father and son, father and daughter, father and daughter-in-law etc survives but the domestic relationship of living in a joint household would not survive & comes to an end."

(emphasis added)

11. In this case it could not have been decided by the Court of MM without recording evidence as to whether any domestic relationship existed between the parties on the date of filing application or soon before that in accordance with law laid down by this Court. It must be kept in mind that resort of Domestic Violence Act cannot be done to enforce property rights. For enforcement of property rights, the parties are supposed to approach civil court. Resort to Domestic Violence Act can be done only where there is urgent requirement of wife to be maintained and provided residence when because of domestic violence, she had been rendered homeless and she had lost source of maintenance. Domestic Violence Act is not meant to enforce the legal rights of property, neither an interim order can be passed without first prima facie coming to conclusion that a domestic relationship existed between

the parties and the applicant was an aggrieved person within the meaning of Section 2(a) of the Domestic Violence Act. In the present case, the order of learned MM and learned ASJ is absolutely silent as to how respondent was an aggrieved person and how a domestic relationship existed between her and petitioners.

12. I, therefore, set aside the orders dated 6th November, 2009 and 30th November, 2009 of learned MM. Learned MM shall record evidence first and decide whether a domestic relationship existed between the parties and whether the applicant fell within the scope of 'aggrieved person' as defined in Section 2(a) of the Protection of Women from Domestic Violence Act, 2005 and then pass appropriate order.

September 20, 2010
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SHIV NARAYAN DHINGRA, J.