

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**MISCELLANEOUS CIVIL APPLICATION (ST) NO.788 OF 2020**

Hitesh Prakashmalji Mehta ..Applicant  
Vs  
Aashika Hitesh Mehta ..Respondent

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Mr.Abhijit D. Sarwate for the Applicant.

Mr.Arvind Chavan for the Respondent.

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**CORAM : C.V. BHADANG, J.**

**DATE : 28<sup>th</sup> SEPTEMBER 2020  
(Through Video Conference)**

**PC.**

1. This is an application for transfer of Criminal Miscellaneous Application No.533 of 2017 pending before the learned Judicial Magistrate First Class at Pune, to the file of the Family Court No.2 at pune where P.A.No.371 of 2018 filed by the applicant for dissolution of marriage, on the ground of cruelty, is pending.

2. The parties are husband and wife. They were married on 22<sup>nd</sup> February 2008 and have two children from the wed-lock. It appears that the marriage ran into rough weather and this led the

applicant/husband to file for divorce on the ground of cruelty in P.A. No.371 of 2018 which is pending before the Family Court at Pune. The respondent/wife has filed Criminal M.A. No.5223 of 2017 against the applicant for various reliefs under the Protection of Women from Domestic Violence Act, 2005 ('D.V. Act' for short) which is pending before the learned Magistrate First Class, Pune. The applicant prays for transfer of the said case to Family Court.

3. I have heard the learned counsel for the applicant and the learned counsel for the respondent.

4. The learned counsel for the applicant submitted that same or similar issues would arise in the matters pending before the Family Court and learned Magistrate, inasmuch as the parties are making allegations of being treated with cruelty, against each other. It is therefore submitted that in order to avoid conflicting decisions/orders and for convenience of the trial and also in order to save time, it is necessary to transfer Criminal Application filed by the respondent, under the D.V. Act to the Family Court, where the petition for divorce, filed by the applicant is pending. The learned counsel has placed reliance on Section 26 of the D.V. Act, in order to submit that any relief, which the aggrieved person, can claim before

the Magistrate, can also be claimed before the Family Court. This in the submission of the learned counsel for the applicant, would show that the application filed under the D.V. Act, can be heard and decided by the Family Court.

5. The learned counsel has placed reliance on the decision of this Court in *Mr.Santosh Machindra Mulik V/s. Mrs.Mohini Mithu Choudahri (MCA No.64 of 2019 decided on 15<sup>th</sup> November 2019)* and *Sandip Mrinmoy Chakraboarty V/s. Reshita Sandip Chakrabarty &Anr. (Criminal Writ Petition No.4649 of 2015 decided on 06<sup>th</sup> September 2018)* in order to submit that in similar circumstances, this Court had directed the transfer of the matter under the D.V. Act, to the Family Court.

6. The learned counsel for the respondent has opposed the application. It is strenuously urged that the application under the D.V. Act, cannot be transferred to the Family Court, inasmuch as the Family Court has no jurisdiction to hear and decide the same. The learned counsel has placed reliance on Section 27 of the D.V. Act, in order to submit, that the jurisdiction to entertain such an application is only with a Magistrate, as defined in Section 2(i) of the D.V. Act. It is submitted that a Family Court is not included in the definition

of a 'Magistrate', and thus in the absence of jurisdiction to entertain the proceedings under the D.V. Act, the request for transfer is misconceived.

7. The learned counsel has placed reliance on the decision of the Division Bench of the Chhattisgarh High Court in ***Smt.Neetu Singh V/s. Sunil Singh***<sup>1</sup>, in order to submit that such transfer is not permissible. Reliance is also placed on the decision of the Supreme Court in the case of the ***Vimlaben Ajitbhai Patel V/s. Vatslaben Ashokbhai Patel and Ors with Ajitbhai R. Patel & Anr. V/s. State of Gujarat and Anr.***<sup>2</sup>.

8. It is submitted that the issues involved in the two proceedings are different. The learned counsel pointed out that the issue before the learned Magistrate is essential, whether the respondent has been subjected to any acts of domestic violence by the applicant and quite to the contrary, the issue before the Family Court, is whether the applicant is entitled to dissolution of marriage, on the ground that the applicant is treated with cruelty. It is submitted that, thus the transfer is not warranted, as it would create complications and stifle the trial of the Domestic Violence

1 AIR-2008-Chhattisgarh High Court-1

2 (2008) 4 Supreme Court Cases 649

case. It is submitted that such transfer, if allowed, would result into the respondent losing a statutory right of appeal/revision before the learned Sessions Judge, which is impermissible. The learned counsel points out that the applicant has made all the attempts to protract the proceedings filed before the learned Magistrate and this is yet another attempt to do so.

9. I have considered the circumstances and the submissions made. The applicant has filed P.A. No.371 of 2018 against the respondent *inter-alia* seeking the relief of, dissolution of marriage and permanent custody of the children. The applicant is also seeking partition of the property, namely a flat situated at Vardhamanpura, Bibwewadi, Pune. The respondent has filed Criminal M.A. No.533 of 2017 under Section 12, 17, 18, 19, 20, 22 and 23(2) of the D.V. Act, seeking a residence order in the Flat situated at Bibwewadi, a protection order and monetary reliefs in the form of a monthly maintenance of Rs.1,50,000/- and compensation in the form of one time, lump sum payment of Rs.50 lakhs, along with costs of Rs.5 lakhs.

10. It is undisputed that in the petition pending before the Family Court, the applicant has entered into the witness box and he

is presently under cross-examination. The evidence in the application before the learned Magistrate is yet to begin. For the limited purpose of deciding the application for transfer, it not necessary to go into the reasons why the evidence has not started before the Magistrate, although these proceedings are filed somewhere in the year 2017.

11. Be that as it may, the principle issue is whether the Family Court can entertain the application, as framed and filed by the respondent, before the learned Magistrate. This issue may not detain me long, as it is covered by at least three decisions of learned Single Judges of this Court, in case of (i) *Minoti Subhash Anand V/s. Subhash Manoharlal Anand*<sup>3</sup> (R.D. Dhanuka, J.), (ii) *Sandip Mrinmoy Chakraborty V/s. Reshita Sandip Chakrabarty*<sup>4</sup> (Smt.Bharati H. Dangre, J.) and (iii) *Mr.Santosh Machindra Mulik V/s.Mrs.Mohini Mithu Choudhari*<sup>5</sup> (S.C. Gupte, J.). It has been consistently held by this Court, in view of Section 7(2)(b) of the Family Courts Act, read with Section 26 of the D.V. Act, that the Family Court would get jurisdiction to entertain application for reliefs under section 18 to 22 of the D.V. Act. It is necessary to note

3 Misc.C.A. No.255 of 2015 decided on 10<sup>th</sup> December 2015

4 2018 SCC Online Bom 2709

5 Misc.C.A.No.64 of 2019 decided on 15<sup>th</sup> November 2019

that in the case of *Sandip Chakraboarty* this Court has also adverted to the issue whether the Family Court would be competent to grant interim relief and has held in the affirmative. Although the learned counsel for the respondent submitted that the entire reliefs which the respondent has claimed before the learned Magistrate, cannot be granted by the Family Court on a carefully consideration of the reliefs sought, I am unable to accept the same.

12. The learned counsel for the respondent pointed out that Section 26 of the D.V. Act, only speaks of the reliefs available under Section 18 to 22 and does not cover Section 17. I am afraid, the contention is misconceived Section 17 only declares the right of the aggrieved person to reside in the shared household. The remedy to enforce any such right, is to be found in Section 19, which is included in Section 26 of the said Act.

13. It was further submitted that the right of appeal/revision available to the respondent would be lost. I find that a similar ground was also raised before this Court in the case of *Santosh Mulik* and the same has been negatived. This is what is held in paragraph No.5 of the order.

“5. Learned Counsel for the Respondent further submits that transfer of the criminal proceeding curtails the right of the Respondent-wife to file an appeal, which she ordinarily would have had if the proceeding were to be decided by the criminal court. We are concerned in the present case essentially with the justice of the case in having the two matters heard together. On the one hand, we have a situation where two different courts would be required effectively to consider the same set of circumstances and could have arrived at two different conclusions or, even possibly, conflicting conclusions, and on the other hand, if this situation were to be avoided, and it appears to be imperative that it be avoided, one particular stage of challenge would be missed. In any event, since from the domestic violence proceeding that may be heard along with the matrimonial proceeding before the Family Court, an appeal would lie to this court, and in that sense, no party can be said to be losing his/her right of appeal, what is lost is further right of revision. That, however, is no ground to deny transfer of proceedings on the basis of the principle of justice noted above.”

I am in respectful agreement with the view as taken.

14. Coming to the case of *Smt. Neetu Singh*, it is necessary to note that this decision was brought to the notice of this Court in the case of *Santosh Mulik (Supra)*. I would still propose to make a brief reference to the same. In that case the wife had filed an application for maintenance under Section 125 of the Code of



Criminal Procedure (Cr.P.C.) before the learned Chief Judicial Magistrate at Bilaspur. The said proceedings were transferred to Family Court at Bilaspur and were pending. The wife filed separate substantive proceedings under section 12 read with Section 19 of the D.V. Act, before the Family Court at Bilaspur. The Family Court, by the impugned order, had returned the same, for filing it before the Competent Court having jurisdiction. That order was subject matter of challenge before the High Court. Although the High Court held that the substantive proceedings filed under Section 12 were not maintainable before the Family Court, the High Court held that it would be open to the wife to seek the reliefs under Sections 18 to 22 of the Act by filing application under Section 26 in the maintenance proceedings which were pending before the Family Court. This is what is held in paragraph 10 and 11 of the judgment :-

*"10. In view of the above scheme of the Act, specially as per the provisions of Section 26 of the Act, the appellant herein is entitled to seek relief available to her under Sections 18,19,20,21 and 22 of the Act, 2005 in the maintenance proceeding pending in the Family Court, Bilaspur. But the appellant is required to move an application under Section 26 read with Section in which she is seeking relief. However, instead of doing that, the appellant moved an independent fresh application under Section 12 of the Act, 2005 which can be entertained only by the Magistrate*

*having jurisdiction. An application under Section 12 cannot be filed before Family Court because proceeding under Section 12 of the Act, 2005, as per the scheme of the Act, has to be filed before the Magistrate competent to entertain the application.*

*11. In the circumstances, we do not find any illegality or infirmity in the order impugned passed by the learned Judge, Family Court. The appeal is, therefore, liable to be dismissed and it is hereby dismissed. Still the appellant is entitled to move an application under Section 26 of the Act, 2005 before the Family Court in the maintenance proceeding said to be pending before that Court.*

*(emphasis supplied)*

15. It can thus clearly be seen that even in that case the High Court has held, that the family Court can entertain an application seeking reliefs under Sections 18 to 22 of the Act, provided they are sought with reference to Section 26. In my humble opinion, it would only be a matter of label, which is not decisive. Thus if the Family Court can entertain an application under Sections 18 to 22, if filed under Section 26 merely because the application is styled as one under section 12, would hardly make any difference.

16. The learned counsel for the respondent also submitted that under Section 28(2) of the D.V. Act the learned Magistrate is

competent to follow his own procedure, which latitude is not available to the family Court. This argument is also negated in the case of *Santosh Mulik*, in view of Sub-Section 3 of Section 10 of the Family Courts.

17. Reliance placed on behalf of the respondent on the decision of the Supreme Court in the case of *Vimlaben Patel* to my mind is misplaced. The Supreme Court in the said case has *inter alia* held that under the provisions of the Domestic Violence Act the wife not only acquires a right to be maintained but also acquires a right of residence, which is a higher right. It has been held that such a right of residence extends only to joint properties, in which the husband has a share. It is difficult to see how judgment can come to the aid of the respondent in this case.

18. Thus looked from any angle the objection raised on behalf of the respondent cannot be upheld.

19. In the result the following order is passed.

**ORDER**

(i) The application is allowed.

(ii) Criminal M.A. No.5223 of 2017 is withdrawn from the file of the learned Judicial Magistrate First Class, 04<sup>th</sup> Court, Pune and is transferred to the Family Court No.2 for disposal according to law.

(iii) In the circumstances, there shall be no order as to costs.

**C.V. BHADANG, J.**