HIGH COURT OF JAMMU & KASHMIR & LADAKH
AT SRINAGAR

CM(M) No.142/2021
CM No.6342/2021

Reserved on: 23.09.2021
Pronounced on: 11.10.2021

Bilal Ahmad Ganai & ors. …Petitioners

Through: Mr. M. A. Qayoom, Advocate

v.

Sweety Rashid & ors. …Respondent(s)

Through: Mr. Mohsin Qadri, Sr. Advocate with
Ms. Ahra Syed, Advocate.

Coram:

Hon'ble Mr. Justice Ali Mohammad Magrey, Judge

Judgment

1. The petitioners have filed this petition invoking the jurisdiction of the Court under Article 227 of the Constitution of India with the prayer to set aside the orders dated 29.04.2021 and 07.09.2021 passed by the learned Additional Sessions Judge, Budgam.

2. It is seen that by order dated 29.04.2021 the learned Additional Sessions Judge has decided the Criminal Appeal no.181/2021 titled Sweety Rashid & ors. v Bilal Ahmad Ganai & ors., filed under Section 29 of the Protection of Women from Domestic Violence Act, 2005, and set aside the order dated 26.03.2021 passed by the learned Judicial Magistrate, 1st Class (Sub-Judge), Chadoora, whereby the trial Magistrate had dismissed the complaint on the ground that it did not have the territorial jurisdiction to entertain the complaint. The order dated 07.09.2021 has been passed by the learned Additional Sessions Judge in Civ. Misc. App no.848/2021 moved before that court when the appeal had long before been decided and there was no *lis* pending before that court pertaining to the matter.

3. Narration of the relevant background facts becomes imperative. Petitioner no.1 and respondent no.1 were married in the year 2012. Respondents 2 and 3 were born out of the said wedlock. On account of some marital dispute between the couple and commencement of litigation between the two, according to the

petitioners, the wedlock was brought to an end by petitioner no.1 by executing Talaq-i-Rajaie on 06.07.2020. According to the petitioner, thereafter, he tried to persuade respondent no.1 to mend her unbecoming behaviour, but all his efforts proved futile, so he pronounced Talaq-i-Bayin against respondent no.1 on 05.09.2020. Thereafter, on 06.10.2020, petitioner no.1 is stated to have pronounced another talaq against respondent no.1 and declared that the marriage between the two shall stand dissolved and that there would be no relation between them as husband and wife.

4. It is averred that though petitioner no.1 and respondents are residents of Wuyan, Tehsil Pampore, District Pulwama, yet respondent no.1, with *mala fide* intention to cause harm, inconvenience and discomfort to the petitioners, filed an application under Section 12 read with other provisions of the Protection of Women from Domestic Violence Act, 2005, (DV Act), before the court of Judicial Magistrate, 1st Class (Munsiff), Chadoora, alongwith an application under Section 23 of the Act praying therein that petitioner no.1 be directed not to cause any act of domestic violence against her and also to direct him to pay the maintenance to the tune of Rs.40,000/- per month. The trial Magistrate passed an *ex-parte* order on 26.06.2020 directing petitioner no.1 to pay an interim maintenance of Rs.3,500/- to each of the respondents 1 to 3 herein, totalling to Rs.10,500/- per month with further direction that respondents' possession of the house shall not be disturbed and that there shall be no interference in their domestic relation with petitioner no.1. The trial Magistrate also directed SHO, Women's Wing, Rambagh, to act as Protection Officer and to submit compliance report. By a subsequent order passed on 27.06.2020, instead of SHO Women's Wing, Rambagh, DO/SHO, Police Station Khrew was appointed as Protection Officer. The Protection officer so appointed is stated to have made a report to the Magistrate on 29.06.2020 stating therein that respondent no.1 was provided protection for residing in the old house, but she wanted to reside in the new house where her mother-in-law, Mst. Zoona, petitioner no.2, was putting up alongwith her daughter who had recently given birth to a child. According to the petitioner, the Protection Officer also reported to the court that since respondent no.1 had only recently used harsh and un-parliamentary language against her mother-in-law, in case she was allowed to live in the new house, the situation on the spot would turn volatile. It was also reported

that the new house was the personal property of Mst. Zoona and that, according to him, no one was legally entitled to claim any interest therein.

5. It is averred that after the Protection Officer submitted its report to the trial Magistrate, petitioner no.1 filed an application seeking dismissal of the complaint on the ground that the court lacked territorial jurisdiction to entertain the complaint as petitioner no.1 and respondents were living at village Wuyan, Pampore, which falls beyond the jurisdiction of the court. The trial Magistrate after obtaining objections from the respondents and hearing the parties, passed order dated 26.03.2021 holding that as per the mandate of section 27 of the Act the court had no territorial jurisdiction to adjudicate upon the matter. The trial Magistrate, accordingly, dismissed the complaint for lack of jurisdiction and revoked all the interim orders passed in the interim application.

6. The respondents filed an appeal against the aforesaid order of the trial Magistrate which was decided by the learned Additional Sessions Judge, Budgam, vide order dated 29.04.2021 whereby the appellate court set aside the trial Magistrate's order and remanded the matter to the court of Judicial Magistrate, 1st Class (Sub-Judge), Chadcoora, with a direction to decide the complaint on the issue of territorial jurisdiction after inviting oral and documentary evidence from the parties to the complaint and after hearing both sides afresh. The appellate court further ordered that till then all the interim reliefs passed by the trial court shall remain in operation. The parties were directed to cause their appearance before the trial court on 12.05.2021.

7. It appears that, thereafter, on 07.09.2021, the respondents made an application before the learned Additional Sessions Judge on 07.09.2021 seeking execution of the order dated 26.06.2020 passed by the trial Magistrate in implementation of order dated 29.04.2021 passed by the appellate court in the appeal. The learned Additional Sessions Judge, Budgam, without issuing notice to the petitioners herein and without affording an opportunity of hearing to them, on the very same date, viz. 07.09.2021, passed an order making certain directions which are quoted hereunder:

> "16. Therefore, under these circumstances and peculiar circumstances of the case this Court has come to rescue for the appellants in implementation and execution of interim relief order dated 26.06.2020 passed by ld Judicial Magistrate 1st Class/Munisff Chadoora in application under Section 23 of the Act. The Child Development Protection officer Pampore is directed to restore the possession of residential/matrimonial house (as shown at para no.7 and 8 of the complaint) to the appellants which is situated over land measuring 3 Kanals falling under survey no.3157, khewat no.877 and Khata no.855 situated at Wuyan Tehsil Pampore District Pulwama where the appellants were residing before their dispossession by the respondents.
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> 17. Before parting with this order, it is made clear that any observation made by this court hereinabove is only for the purpose of deciding the instant criminal misc. application and shall have no effect on the merits of the case.
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> 18. The SHO police station Khrew is already under litigation with appellants before Hon'ble High Court of J&K and Ladakh in Writ Petition No.1080/2021, therefore the copy of this order shall be sent to Child Development Officer Pampore for its implementation in letter in spirit (*sic*) and further directed Executive Magistrate 1st Class Pampore to render assistance to Protection Officer in execution of this order and for maintaining the peace and tranquillity on the spot.
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> 19. The Protection Officer is directed to submit the compliance report on or before next date which is fixed on 20th September of 2021. Let the application shall come up on next date which is fixed on 20th September 2021 for further orders."

8. As said at the start of this judgment, the petitioners have challenged the above orders dated 29.04.2021 and 07.09.2021 - the first having been passed by the learned Additional Sessions Judge, Budgam, in the appeal and the other one in an application made about 04 months and 22 days thereafter - on the grounds taken in the petition.

9. The respondents, represented by Mr. Mohsin Qadri, Sr. Advocate, were on caveat. Mr. Qadri opted not to file any objections and, instead, to argue the case for final disposal. So the case was finally heard.

10. As regards the order dated 29.04.2021 passed in the appeal by the learned Additional Sessions Judge, Budgam, Mr. Qayoom submitted that the same is totally

erroneous as the trial court had come to a definite conclusion that the respondents were not living at Mochua, Chadoora, and that the appellate court over set the finding of the trial court on surmises and conjectures that a petition under the provisions of the DV Act can be filed in any court where the aggrieved person resides permanently or temporarily or caries on business or is employed; that jurisdiction of court would not be there where an aggrieved person starts residing deliberately only for the purpose of filing a case under DV Act; and that in the suit filed by respondent no.1 before the Principal District Judge, Pulwama, for declaration that she and petitioner no.1 are joint owners of the property, she has shown her residence as Wuyan, Pampore, Pulwama, Kashmir. So, according to Mr. Qayoom, the courts at Chadoora lacked territorial jurisdiction to entertain the complaint. So far as the order dated 07.09.2021 is concerned, it was argued by Mr. Qayoom that once the appellate court passed the order dated 29.04.2021 allowing the appeal, remanding the case to the trial Magistrate ordering that all the interim directions passed by the trial Magistrate shall remain in operation, it ceased to have any jurisdiction over the matter thereafter, and that if the respondents had any grievance, they had to approach the trial Magistrate for implementation of order dated 26.06.2020. Mr. Qayoom submitted that even if the respondents had filed such application before the learned Additional Sessions Judge, Budgam, the court was obliged to return the same to them to be presented before the trial Magistrate for its disposal in accordance with law. Instead of doing so, the Additional Sessions Judge, Budgam, proceeded to entertain the application for implementation of order dated 26.06.2020 and passed the impugned order dated 07.09.2021. Mr. Qayoom further submitted that the doctrine of merger would not be applicable in the instant case as the appeal had been filed against order dated 26.03.2021 passed by the trial Magistrate, not against orders dated 26.06.2020 and 27.06.2020 which were, in fact, interim directions passed by the trial Magistrate in favour of the respondents.

11. On the other hand, Mr. Qadri, learned counsel for the respondents took an objection to the maintainability of the present petition under Article 227 of the Constitution, saying that the DV Act is a criminal enactment and, therefore, if the petitioners herein are in any way aggrieved of any orders passed by the learned Additional Sessions Judge, the same can be challenged only by invoking the

jurisdiction of the Court under Section 482 Cr. P. C. Mr. Qadri in this regard relied upon the judgment of the Supreme Court in ***Radhey Shyam v Chhabi Nath***, 2015 AIR SCW 1849. Mr. Qayoom, on the other hand, in this regard, citing a judgment of the Madras High Court in ***Dr. P. Pathmanathan v Tmt. V. Monica***, Cr. OP Nos. 28458 etc. of 2019, decided on 18.01.2021, submitted that a petition under Article 227 of the Constitution against an order passed under the provisions of the DV Act was maintainable. He further submitted that even if the Court for any reason comes to the conclusion that this petition under Article 227 of the Constitution was not maintainable, then the Court has the power to convert it and treat it as a petition under Section 482 Cr. P. C. In this connection, the learned counsel cited and relied upon the judgement of the Supreme Court in ***M/s Pepsi Food Ltd. v. Special Judicial Magistrate***, 1998 SC 128. To this course being adopted a feeble objection was sought to be raised that if the petition was ordered to be converted and treated as a petition under Section 482 Cr. P. C., then the petition would need to be sent back to the Registry to be listed before the Roaster Bench.

12. I have given my thoughtful consideration to the submissions made at the Bar by the learned counsel for the parties and to the facts and circumstances of the case.

13. So far as the maintainability of this petition under Article 227 is concerned, in the judgment cited and relied upon by Mr. Qadri, viz. ***Radhey Shyam v Chhabi Nath*** (supra), the Supreme Court has observed that under Article 227 of the Constitution, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned and that such power is not to be exercised to correct a mistake of fact and of law. So, going by the very judgment cited and relied upon by Mr. Qadri, there is no bar in entertaining a petition under Article 227 of the Constitution even in orders passed by criminal courts. The condition laid down is that there must be manifest miscarriage of justice occasioned, and that power is not to be exercised to correct a mistake of fact and of law. Similarly, in ***Dr. P. Pathmanathan v Tmt. V. Monica*** (supra) cited by Mr. Qayoom, the High Court of Madras has held that a petition under Article 227 of the Constitution challenging the proceedings under Chapter IV of the DV Act in an appropriate case would be maintainable.

14. In the instant case, the learned Additional Sessions Judge decided the appeal by order dated 29.04.2021 with the following operative part thereof:

> "22. After bestowing my anxious consideration to the facts and circumstances of the case, I am convinced that the learned Magistrate approached the whole matter from a wrong angle resulting in miscarriage of justice. Since the temporary residence being one of the incident of jurisdiction the controversy whether the residence of the appellants at Machwa was a temporary residence or not, can be decided only after the evidence. This fact can be decided only on the basis of evidence. Therefore the trial court has passed impugned illegal order and has ignored the settled principle of law regulating jurisdiction under Section 27 of the Act. The impugned order is accordingly set aside and the case is remanded back to the court of Judicial Magistrate 1st Class Sub Judge Chadoora with a direction to decide the complaint on the issue of territorial jurisdiction after inviting oral and documentary evidence from the parties of the complaint and after hearing both sides afresh and thereafter pass appropriate orders as the situation demands till then all the interim reliefs passed by the trial court shall remain in operation. The complaint be decided expeditiously most preferably within a period of two months from the date of receipt of this order. The parties of the present appeal are directed to cause their physical appearance before the trial court on 12th May 2021."

15. It was long thereafter on 07.09.2021 that the respondents herein filed an application before the Additional Sessions Judge, purportedly, as mentioned in the first para at page 3 of the impugned order dated 07.09.2021, for executing the interim order dated 26.06.2020 passed under Section 23 of the DV Act by the learned Judicial Magistrate, in view of order dated 29.04.2021 passed by the appellate court in the appeal under Section 29 of the said Act on the principle of merger. There are two striking factors axiomatically manifest that by order dated 29.04.2021 the appellate court had directed the trial Magistrate to decide the complaint on the issue of territorial jurisdiction after inviting oral and documentary evidence from the parties and, thereafter pass appropriate orders as the situation would demand. Till then the interim directions dated 26.06.2020 read with order dated 27.06.2020 were to remain in operation.

16. Obviously, the purpose of restoring the operation of all the interim orders passed by the learned trial Magistrate was to continue the *status quo ante* as it obtained on the date of dismissal of the complaint by the trial Magistrate on the

ground that it lacked territorial jurisdiction. Once the learned Additional Sessions Judge finally decided the appeal and directed the trial Magistrate to hear and decide the complaint on the issue of territorial jurisdiction after inviting oral and documentary evidence from the parties of the complaint and after hearing both sides afresh and thereafter pass appropriate orders as the situation would demand, the appellate court became *functus officio*. Law in this regard is settled. Reference in this connection may be made to the decision of the Supreme Court in ***Hari Singh Mann v Harbhajan Singh Bajwa***, (2001) 1 SCC 169. In that case the High Court of Punjab and Haryana had decided a petition under Section 482 Cr. P. C. by order dated 07.01.1999. Thereafter, the very same petitioner had filed a criminal miscellaneous application which was disposed of by the same learned Single Judge, apparently, without notice to the appellant before the Supreme Court or any other respondent in that petition with certain directions. The Supreme Court in para 8 of the judgment observed and held as under:

> "8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7.1.1999, there was no lis pending in the High Court wherein the respondent could have field any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of the Code of Criminal Procedure or the rules of the court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because Respondent 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30-4-1999 and 21-7-1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court."

In the instant case also, the learned Additional Sessions Judge, Budgam, has entertained the miscellaneous application long after disposal of the main appeal, when there was no *lis* concerning the matter pending before it. Not only that, the

impugned order has been passed without notice to the petitioners herein. What is curious, the learned Additional Sessions Judge in its order has said that the appellants have rightly approached to the court for the execution of order dated 26.06.2020 passed by the trial Magistrate and then has proceeded to grant an interim relief to the respondents much beyond what had been ordered by the trial Magistrate. Under the garb of the doctrine of merger, the learned Additional Sessions Judge has converted itself into an executing court for the orders passed by the trial Magistrate. This course is neither permissible under law, nor referable to any provision of the Code or the DW Act. At least, neither any provision of law permitting such a course is mentioned in the impugned order, nor brought to the notice of this Court. The impugned order, therefore, is totally without jurisdiction. Thus, having regard to the fact that the impugned order has been passed without jurisdiction and without notice to the petitioners and, consequently, without hearing them, it has occasioned a manifest miscarriage of justice. The present petition, therefore, is not a petition for correction of a mistake of fact or of law; it is a petition for undoing the miscarriage of justice caused by the impugned order. So on the principle of the law laid down by the Supreme Court in ***Radhey Shyam v Chhabi Nath*** (supra), cited at the Bar and relied upon by Mr. Qadri, this petition under Article 227 of the Constitution is held to be maintainable.

17. Now that this Court has found that the learned Additional Sessions Judge has passed the impugned order dated 07.09.2021 without notice and without jurisdiction, it cannot stand the test of law.

18. So far as the order dated 29.04.2021 passed by the learned Additional Sessions Judge, Budgam, in the appeal is concerned, thereby the appellate court has only directed the trial Magistrate to decide afresh the complaint on the issue of territorial jurisdiction after inviting oral and documentary evidence from the parties to the complaint and after hearing both sides and thereafter pass appropriate orders as the situation would demand, and that till then all the interim reliefs passed by the trial court shall remain in operation. This Court does not see that the appellate court has committed any illegality in remanding the case to the trial Magistrate for the aforesaid purpose.

19. For the aforesaid reasons, this petition is partly allowed. The impugned order dated 07.09.2021 passed by the learned Additional Sessions Judge, Budgam, in Cr. Misc App no.848/2021 is set aside. Parties are directed to appear before the trial Magistrate on the date as may have been fixed there in the complaint. However, the trial Magistrate is directed to hear and decide the complaint with some speed, preferably within next three months.

20. This also disposes of CM 6342.

(Ali Mohammad Magrey)
Judge

Srinagar
11.10.2021
Syed Ayaz Hussain, Secy

i) whether approved for reporting Yes/No
ii) whether the judgment is speaking Yes/No.