2013 (0) AIJEL-HC 229477

GUJARAT HIGH COURT

Hon'ble Judges:K.M.Thaker, J.

Dilipkumar Rajaram Kosti Versus State Of Gujarat

SPECIAL CRIMINAL APPLICATION No. 225 of 2012 ; *J.Date :- FEBRUARY 25, 2013

- CODE OF CRIMINAL PROCEDURE, 1973 Section - 482 , 125
- INDIAN PENAL CODE, 1860 Section - 498A
- PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

Code of Criminal Procedure, 1973 - S. 125, 482 - Indian Penal Code, 1860 - S. 498A - Protection of Women from Domestic Violence Act, 2005 - quashing of complaint - petitioners seeking dropping of proceedings under the Domestic Violence Act - alleged incidents of domestic violence prior to the Act of 2005 came into existence - petitioners contended that the Act, 2005 has no retrospective effect - application for discharge filed by petitioners before Trial Court rejected - appeal before Sessions Court - dismissal of appeal - challenged - held, complaint u/s 498A of IPC already filed by respondent complainant - complainant was driven out of matrimonial house in the year of 2000 after a span of 11 months from the date of marriage - cause of action subsists since complainant was driven out of matrimonial house - when effect and consequence of alleged acts which amount to offence under the Act subsists after Act, 2005 comes into effect, remedy under the Act, 2005 available to the aggrieved party - wife is entitled to lodge a complaint under the Act, 2005 even if alleged incident of violence occurred prior to the Act, 2005 came into existence - on the date of filing of the complaint, marriage between the parties subsists - Trial Court has already commenced the proceedings on the basis of report of Protection Officer - while entertaining proceedings u/s 482 of the CrPC it is not permissible to examine the genuineness of the allegations and quality and nature of the evidence - no justification to interfere in concurrent findings of courts below - petition dismissed.

Imp.Para: [8] [9] [11] [14] [17] [18]

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JUDGMENT :-

1 Heard Mr. Ramnani, learned advocate for the petitioners, Mr. Aftabhusen Ansari, learned advocate for respondent No.2 and Mr. H.L. Jani, learned APP.

2 In present petition under section 482 of the Code, the petitioners have prayed, inter alia, that:

> "16 (A).....
>
> (B) Your Lordships be pleased to allow this petition and quash and set-aside the impugned order dated 12.12.2011 passed by the learned Additional City Sessions Judge, Ahmedabad in Criminal Appeal No. 184/2011 confirming the order dated 26.04.2011 passed by the Hon'ble Metropolitan Magistrate Court below Exh. 9 in Cri. Misc. Application No.505/2010 (Now transferred to Court No.21 and numbered as Cr.M.A. 98/10) and discharge the petitioners from the proceedings filed under the provisions of Protection of Women from Domestic Violence Act 2005 pending before the Hon'ble Metropolitan Magistrate Court No.21, Ahmedabad numbered as Criminal Misc. Application No.98/2010.
>
> (C) Pending hearing and final disposal of the present application Your Lordships be pleased to stay further proceedings of Criminal Misc. Application No.98/2010 pending before the Hon'ble Metropolitan Magistrate Court No.21, Ahmedabad.
>
> (D)....."

3 The petitioners have challenged the order dated 12.12.2011 passed by the learned Additional Sessions City Civil and Sessions Court, Ahmedabad in Criminal Appeal No.184 of 2011 which was preferred by the present petitioners against the order dated 13.8.2010 passed by the learned Metropolitan Magistrate, below Exh.9 in Criminal Case No.505 of 2010.

4 The petitioners herein had submitted said application Exh.5 in Criminal Case No.505 of 2010 requesting the learned trial Court to drop the proceedings against the petitioners on the premise that the incidence alleged in the complaint had occurred before the date on which the Protection of Women from Domestic Violence Act, 2005 ('the Act' for short) came into operation and since the said act does not have retrospective operation, the proceedings are not maintainable and should be dropped. The learned trial Court considered the contentions raised by the petitioners and also considered the report of the protection officer and upon considering the entire material on record, the learned trial Court came to the conclusion that there was enough material to prima facie demonstrate that case for continuing proceedings was made-out. Having reached such conclusion, the learned trial Court rejected the said application Exh.9 vide order dated 13.8.2010. Against the said order an Appeal (No.338/2010) was filed wherein order dated 15.12.2010 was passed and the case was remanded. Thereafter, learned trial Court passed order dated 26.4.2011 whereby the discharge application came to be rejected.

> 4.1 Upon feeling aggrieved by the said order 26.4.2011, the petitioners herein preferred appeal before the Additional Sessions Judge, City Civil and Sessions

Court which came to be rejected by order dated 12.12.2011.

4.2 Against the said two orders, present petition is preferred.

4.3 So far as factual background is concerned, it has emerged from the record and the submissions by the learned counsel for the petitioners and respondent NO.2 that the marriage between petitioner No.1 and respondent No.2 was solemnised at Ahmedabad in December 1999.

4.4 Within short time after marriage, respondent No. 2 was constrained to file complaint against the petitioners under section 498A of IPC.

4.5 It appears that in or around November 2000, respondent No.2 was driven out or had to leave matrimonial house and was compelled to stay with her parents. It also appears that somewhere in 2003, present petitioner No.1, i.e. husband initiated proceedings for divorce against respondent No.2.

4.6 The said divorce proceedings are pending by way of appeal inasmuch as the petition seeking divorce was rejected by the learned trial Court, which was filed by the petitioner husband. Subsequently, in 2006, respondent No.2 wife initiated proceedings under section 125 of the Code for appropriate amount for maintenance.

4.7 The respondent also has a daughter born from the wedlock between her and the petitioner No.1.

4.8 The application praying for maintenance was partly allowed.

4.9 It has also emerged from the record that in March 2010, respondent No.2 wife initiated proceedings under the Act, which came to be registered as Criminal Case No.505 of 2010. The petitioners herein entered appearance in the said proceedings and in April 2010, present petitioners preferred application praying inter alia that the petitioners may be discharged from the said proceedings i.e. Criminal Case No.505 of 2010.

4.10 The said application (Exh.9) came to be rejected vide order dated 13.8.2010. The petitioners preferred an Appeal against the said order dated 13.8.2010 which was registered as Criminal Appeal No. 338 of 2010.

4.11 By order dated 15.12.2010, the said Appeal being Criminal Appeal No.338 of 2010 was partly allowed and the case was remanded to the Trial Court for fresh decision after giving opportunity of hearing to both sides.

4.12 The said order dated 15.12.2010 was challenged by present respondent No.2 in Special Criminal Application No.531 of 2011. However, said petition was subsequently withdrawn by respondent No.2.

4.13 Subsequently, the learned Trail Court passed another order dated 26.4.2011 below Exhibit-9 in Criminal Misc. Application No.505 of 2010 whereby the learned

Trail Court rejected the application seeking discharge.

4.14 Thereafter, the petitioners filed Criminal Appeal No.184 of 2011 which has been rejected by impugned order dated 12.12.2011.

4.15 The petitioners are aggrieved by the said order. Hence, present petition under Section 482 of the Code.

5 Mr. Ramnani, learned advocate has appeared for the petitioners, Mr. Aftabhusen Ansari, learned advocate has appeared for respondent No.2 and Mr. Jani, learned APP has appeared for the respondent State.

6 Learned advocate for the petitioners contended that the complaint under the provisions of the Act has been filed in connection with the offence allegedly committed before the date when the Act came into operation and that therefore the complaint is not maintainable.

6.1 He also submitted that the allegations made by respondent No. 2 are general in nature and any specific allegations are not made against the petitioners and that therefore the application (Exhibit-9) preferred by the petitioners ought to have been allowed.

6.2 Learned advocate for the petitioners also submitted that the relief prayed for by the complainant i.e. respondent No.2 can be granted against accused No.1 i.e. husband and not against other accused persons and that therefore also the application preferred by the petitioners seeking discharge ought to have been allowed.

7 Mr. Ansari, learned advocate for the respondent No.2 has opposed the petition. He has submitted that merely because petitioner No.1 and the respondent No.2 have been staying separate since 2006, it cannot be said that any offence is not committed.

7.1 He submitted that commission of alleged offence continued even after the Act came into operation and even after the respondent No.2 started staying separate.

7.2 Learned counsel for respondent submitted that the complaint made by the respondent No.2 wife is, against all accused persons whose names are mentioned in the complaint i.e. the petitioners and that therefore the petitioners contention that the complaint is not maintainable or the petitioners should have been discharged is not justified.

7.3 He also submitted that under the Act there is no provision to seek discharge and therefore the application Exhibit 9 could not have been entertained by the learned trial Court.

7.4 Learned advocate for the respondent No.2 also submitted that the petitioners are not justified in claiming that since the application under Section 498(A) has been disposed of in favour of the petitioners, the application under the Act also should have been disposed of so that the petitioners may not have to under go the

proceedings, inasmuch as the other application filed under Section 498 (A) is still pending.

7.5 Learned advocate for the respondent also emphasized the ill-treatment and abuse to which the respondent No.2 was subjected, including the ill- treatment and abuse which she had to suffer after the petitioners compelled her to undergo sex determination test.

7.6 Mr. Jani, learned APP supported the submission by learned advocate for the respondent No.2 and submitted that the impugned orders are not erroneous and the proceedings do not deserve to be dropped at this stage at the request of the petitioners.

8 It is not in dispute that due to matrimonial dispute the respondent No.2 was driven out of matrimonial house or she was constrained to leave the matrimonial house and since about November 2000 i.e. within span of about 11 months from the date of marriage, the respondent No.2 had to leave the matrimonial house and since then she is still living with her parents.

8.1 Meaning thereby, according to the petitioner the actions and the cause which allegedly drove the petitioner out of matrimonial house or compelled her to stay with her parents still i.e. after the Act came in force, continues and that therefore the cause of action subsists and, in nature and in effect, it is a continuing cause of action and / or continuing offence and it is in light of such fact - situation that the petitioner has put up her claim before learned Trial Court.

8.2 When effect and consequence of alleged acts - which amount to offence under the Act - subsists and persists after the Act came in force then the cause of action would survive and would be available to the aggrieved party who, in turn, can maintain proceedings under the Act for appropriate relief against the consequence and effect (of the past actions) which the aggrieved party continues to suffer.

8.3 This aspect can be demonstrated in light of the provision under the Act. In a given case if a wife is driven out of matrimonial house or she is compelled to leave her matrimonial house due to acts of husband and / or his family members before the Act came into force and thereafter (i.e. after the Act came into force) if the marriage is not dissolved in accordance with law and the wife stays, or has to stay, separate or if the situation compelling the wife to stay separate continues, then subject to other conditions under the Act, the remedy provided under the Act viz. to pray for "order of residence" would be available to the wife and the plea that she left the matrimonial house before the Act came into force hence order of residence cannot be made, would not be available in light of the scheme of the Act, intention of the legislature and provisions under the Act.

8.4 In present case the facts give out that according to the respondent's submission she had continuing cause of action for appropriate order under the provisions of the Act.

8.5 The marriage still subsists in eye of law. Therefore, the respondent is legally entitled to stay in matrimonial house. However, she is allegedly driven - out or is compelled to go out, of her matrimonial house and has to stay separate / with her parents. The said effect and consequence subsists and continues.

8.6 Under the circumstances, contention by learned advocate for the petitioners that alleged offence have been committed prior to the date when Act came into operation cannot be sustained and the proceedings, on such ground cannot be dropped and that therefore the petitioners, on such ground do not deserve to be discharged.

9 From the record and also from the submissions by learned advocate for the petitioners, respondents and learned APP, it has emerged that the learned trial Court commenced the proceedings after considering the report of protection officer.

9.1 In his report the protection officer appears to have recorded his prima facie satisfaction/ conclusion that the allegations made by respondent No.2 and relief prayed for by the complainant i.e. respondent No.2 are not without substance and deserve to be considered by the Court.

9.2 It is after taking into consideration the said aspect that the learned trial Court commenced the proceedings and that therefore at this stage, when the proceedings are yet to be conducted further and the parties are yet to place sufficient and cogent evidence and other material on record for consideration by the learned trial Court, it would not be proper for this Court to exercise power under Section 482 of the Code and to prematurely terminate or drop the proceedings at nascent stage and / or discharge the petitioners.

10 On perusal of the record, it appears at this stage that the petitioners do not have any basis or justification to claim that any ground to continue proceedings and / or any ground to seek relief as prayed for in the complaint are not made out.

11 At this stage in the proceedings under Section 482 of the Code, this Court is not required to examine the genuineness of the allegations and / or quality and nature of evidence and this Court is also not supposed to record even prima facie conclusion and / or to determine as to whether the allegations and charge can be proved or not.

12 It is pertinent that the proceedings appear to have been commenced after considering the report of the protection officer and after considering the said report, the complaint and other material available on record, learned trial Court has recorded prima facie finding that ingredient of the alleged offence is made out and there is material on record to continue the proceedings.

13 The said finding of the learned trial Court has been examined by the Appellate Court also and Appellate Court has also confirmed the said finding under order dated 12.12.2011 passed in Criminal Appeal No.186 of 2011.

14 The petitioners have failed to make out any case to convince this Court, at this stage to hold that the said two concurrent findings i.e. conclusions by learned trial Courts and the learned Appellate Court are baseless, unjustified or contrary to the record.

15 It is noticed that the respondent No.2 was allegedly compelled to undergo / pass-through sex determination test when she was pregnant and when the Doctor informed petitioner No.1 and his family that would - be child is a girl, the accused persons i.e. petitioners, particularly petitioner Nos. 2 and 3 and other family members started abusing the respondent No.2.

15.1 The said allegations are yet to be considered and examined by the learned trial Court and at this stage this Court, merely on the basis of the submission by the petitioners, cannot throw out the said allegations and the complaint based on such allegations even before the complainant gets opportunity to substantiate and establish the allegations and prove her case.

16 The said and other allegations deserve to be examined by the learned trial Court and the petitioners are not justified in claiming that the said allegations are baseless and incorrect and that therefore the petitioners should be discharged.

17 Even if it is assumed that in the proceedings initiated under the provisions of the Code, the accused / opponent can maintain the application for discharge, then also, as held by the learned trial Court and the learned Appellate Court in the two concurrent orders, and as noticed by this Court also, the claim that the petitioners should be discharged even before proper commencement of the proceedings and before the complainant gets opportunity to lead evidence and place or record sufficient material and before evidence is recorded by the learned trial Court, cannot be entertained and granted at this stage.

18 On overall consideration of the facts and circumstances of the case and the material on record and upon examination of the order passed by learned Appellate Court and the order passed by the learned Trial Court, it emerges that the said orders do not suffer from any infirmity or any error of law or jurisdiction.

18.1 This Court is not inclined to accept petitioners request that petitioners should be discharged at the stage of the proceedings and the proceedings should be dropped.

19 It appears, prima facie, that learned Courts are justified in holding that there is material to justify that the proceedings should be continued and the complaint should be tried.

19.1 It is only after the evidence is recorded that the Court would be in position to examine the sustainability of the complaint and claim for relief.

20 The petitioners have failed to make out any case against impugned orders and/or in support of the relief prayed for by the petitioners in the petition.

21 As an upshot of the foregoing discussion the petition does not deserve to be entertained and the same is accordingly rejected. Notice is discharged.