

Sachin Gaur vs State Of Nct Of Delhi & Ors on 4 April, 2025

Author: Neena Bansal Krishna

Bench: Neena Bansal Krishna

* IN THE HIGH COURT OF DELHI AT NEW DELHI
% Pronounced on: April 04, 2025
+ CRL.M.C. 1381/2017 & CRL.M.A. 5587/2017
SACHIN GAURPetit
Through: Mr. Anubhav Gupta, Mr. Manish
Kaushik, Mr. Mishal Johari, Mr.
Joher & Mr. Yashpriya Sahran,
Advocates
Mr. Madhav Khurana, Senior
Advocate with Mr. Teeksh, Advoca
(Amicus Curiae)
Versus
STATE OF NCT OF DELHI & ORS.Respondents
Through: Mr. Satinder Singh Bawa, Additional
Public Prosecutor for Respondent-
State
CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA
J U D G M E N T
NEENA BANSAL KRISHNA, J.

1. Petition under Section 482 of Code of Criminal Procedure, 1973 ('Cr.P.C.' hereinafter) has been filed against the Order dated 25.02.2017 whereby learned Metropolitan Magistrate (Mahila Court), Rohini, Delhi has allowed the Application under Section 311 Cr.P.C. filed by Respondent No.2 Ms. Neelam Gaur and permitted the evidence affidavit of her father- Surinder Kumar Sharma.

2. Briefly stated, Petitioner, Sachin Gaur got married to Respondent No.2- Ms. Neelam Gaur on 01.02.202002 and two children were born from their wedlock.

3. Respondent No.2- Ms. Neelam Gaur preferred a Complaint CC No. 100200/16 under Section 12 read with Sections 17,18,19,20,22 & 23 of Protection of Women from Domestic Violence Act, 2005 ('DV Act' hereinafter) before the learned Metropolitan Magistrate. She also lodged FIR No. 214/2009, under Sections 406/498/34 of the Indian Penal Code, 1860 ('IPC' hereinafter) at Police Station Keshavpuram, Delhi on 22.07.2009, against the Petitioner and his family members.

4. During pendency of the DV Act proceedings, Respondent No.2-Ms. Neelam Gaur preferred an Application under Section 311 Cr.P.C. for adducing additional evidence of her father- Surinder Kumar Sharma by way of Affidavit.

5. The Petitioner opposed the said Application on the ground that evidence of Complainant's father or any other witness, cannot be led by way of an Affidavit.

6. Learned Metropolitan Magistrate by impugned Order dated 25.02.2017 allowed the evidence of the father to be led by way of Affidavit.

7. Aggrieved by the Order, present Petition has been filed wherein the impugned Order has been challenged on the ground that under the DV Act the evidence has to be led in the Court in person and cannot be permitted to be taken by way of Affidavit. To support this proposition, it is contended that Section 28(1) of the DV Act read with Rule 6(5) of DV Act postulates that proceedings therein, shall be conducted in the same manner as under the provisions of Cr.P.C., 1973.

8. Section 126 Cr.P.C. provides the procedure for disposal of proceedings under Section 125 Cr.P.C. Clause (2) of Section 126(2) postulates that all evidence shall be taken in presence of person against whom an Order for payment of maintenance is proposed to be made and shall be recorded the manner provided for summons case. The Section is as follows:

"126. Procedure.--

(1) Proceedings under section 125 may be taken against any person in any district--

(a) where he is, or

(b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child. (2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just."

9. Chapter XXIII Cr.P.C. provides that evidence be taken by examining the witness in the Court. The aforesaid position has not been changed by Section 10 of the Family Court Act, 1984, which is in

consonance with the provisions of Cr.P.C. Section 60 of Evidence Act provides that oral evidence must in all cases, whatsoever be direct. It is therefore, abundantly clear that the testimony of the witnesses in proceedings under Section 12 of DV Act, have to be recorded in Court and not through Affidavit of evidence.

10. Section 296 Cr.P.C. makes an exception only for evidence of formal witnesses whose evidence may be led way of Affidavit. It is similarly provided in Section 16 of the Family Court Act.

11. The only other exception of taking evidence of witnesses by way of Affidavit is provided in Section 145 Negotiable Instruments Act, 1881, which starts with a non-obstante Clause by making an exception to the procedure. No such exception exists in in proceedings under the DV Act.

12. Thus, the learned MM has fallen in error in permitting recoding of evidence of father of the Complainant, who is not a formal witness, by way of Affidavit.

13. Furthermore, the learned MM has failed to consider that Respondent No.2 filed no list of prosecution witnesses as mandated under Section 204(2) Cr.P.C., despite which she has been permitted to examine her father as her witness. It is claimed to be only an attempt to cover up the lacunae in the cross-examination of Complainant/Respondent No.2 and that of her father in proceedings under FIR No. 214/2009, under Sections 498A/406/34 IPC.

14. A prayer is, therefore, made that the impugned Order dated 25.02.2017 of learned Metropolitan Magistrate be set aside and that examination-in-chief of the witness, father be directed to be recorded in Court and not be accepted by way of Affidavit.

15. The learned Amicus Curiae was appointed vide Order dated 23.09.2024, who has submitted his brief note on: "Should the trial under Domestic Violence Act proceedings proceed by recording evidence in court and not by way of examination in chief by affidavit?"

16. Submissions heard and written submissions perused. My observations are as under:

17. The Petitioner-Sachin Gaur has challenged the Order dated 25.02.2017 of learned MM whereby Application under Section 311 Cr.P.C.

was allowed and evidence of father of the Complainant/ Respondent No.2 was permitted to be recorded by way of Affidavit.

18. There are two aspects of grievance on the part of the Petitioner. The first is on the merits, wherein he has questioned permitting of father to appear as witness in the absence of list of witnesses filed by the Respondent No.2 in support of her Complaint under DV Act.

19. The record shows that the Complaint under DV Act was filed on 07.07.2009. In the interim, parallel proceedings were initiated by the Complainant by lodging of FIR No. 214/2009, in which on

filing of the charge-sheet, Respondent No.2 and her father were examined and cross-examined between 15.07.2016 till September, 2016. Thereafter, Respondent No.2 in the proceedings under DV Act moved an Application on 16.01.2017 seeking to lead the evidence of her father by way of Affidavit, which got allowed by the learned MM vide impugned Order dated 25.02.2017.

20. The Petitioner has claimed that the introduction of the father of the Complainant as a witness is only an endeavour to fill the lacunae which however, is completely fallacious. The stand in the testimony of the father is already known to the parties, especially when he got examined in FIR No. 214/2009, registered under Sections 498A/406/34 IPC. The father is one person who knows about the facts and can corroborate with the testimony of the Petitioner. It cannot be said that his testimony is intended to be introduced to fill in the lacunae in the case of the Petitioner. The evidence led in FIR case has to be read independently, in accordance with rules of evidence.

21. The essential aspect to be considered while allowing the Application under Section 311 Cr.P.C. for examination of additional witness, is primarily its relevance. There is no challenge to the relevancy of the testimony of the father to the facts raised in the Complaint case. Therefore, there is no infirmity in permitting the father to be examined as a witness of Respondent No.2.

22. The second aspect which is the main ground for challenge is that the evidence of the father cannot be permitted to be led by way of Affidavit, as it is contrary to the procedure envisaged under DV Act and Cr.P.C. The Cr.P.C. mandates that all the material witnesses have to be recorded in the Court in the presence of the accused. It is only formal witnesses who have now been permitted to be examined on affidavit.

23. The moot question is: whether in the proceedings under the DV Act, the examination in chief of a witness can be tendered by way of Affidavit?

24. To understand the scope and controversy of the objections taken by the Petitioner, it is pertinent to observe that the Committee on the Elimination of Discrimination against Women (CEDAW) in its recommendations had directed that the State parties to act to protect women against violence of any kind occurring within the statement of objects and reasons of the protection of women. It was observed that the phenomenon of domestic violence in India is widely prevalent, but has remained largely invisible in public domain, where a woman is subjected to cruelty by her husband and her relatives, which is an offence under Section 498A IPC but the civil law does not address this phenomenon in its entirety. Therefore, the law was proposed to be enacted keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution of India, to provide for a remedy under the Civil Law, which is intended to protect the women from being victims of domestic violence and to prevent occurrence of domestic violence in the Society.

25. From the Statement of Objects and Reasons of the Act, it is abundantly clear and needs no further elaboration that the remedies provided under the DV Act are civil and not criminal remedies. The Application under Section 12 of the DV Act has to be adjudicated on merits, essentially by following civil procedure, which may be improvised or defined under Section 28 of DV Act.

26. This aspect was considered by the Apex Court in the case of Kunapareddy alias Nookala Shankar Balalu vs. Kunapareddy Swarna Kumari and Another (2016) 11 SCC 774 wherein it was held that the proceedings under DV Act are essentially civil in nature. While incorporating Sub-Section (2) of Section 28 of DV Act makes Cr.P.C., 1973 procedures applicable to the DV Act, but the proceedings are civil in nature inasmuch as even the amendment of the Complaint, is allowed. It was held that the relief granted by the Court are absolutely civil in nature.

27. This aspect was considered by the Apex Court in the case of Kamatchi vs. Laxmi Narayanan (2022) 15 SCC 50 wherein it was observed that proceedings under Section 12 DV Act are initiated on filing of a Complaint which is followed by a reply of the Respondent and after considering the rival proceedings and also by taking evidence by way of affidavit, if so desired by the Court, the appropriate Orders under Section 12 of the Act may be passed. The procedure thus, followed indicates that the proceedings are conducted by following civil procedure.

28. It would also be pertinent to refer to the decision of a Division Bench of this Court in Shambhu Prasad Singh Vs. Manjari 2012 SCC OnLine Del 2895, wherein it was held that the Act being a beneficial one, the Court should adopt a construction to its provisions which advances the parliamentary intention rather than restricting it. If the latter course is adopted, the result would be to defeat the object of the law.

29. Likewise, in the case of Saleem Ahmad vs. State of Uttar Pradesh 2024 SCC OnLine All 1731, Apex Court resonated a similar sentiment when it observed that the object of the Act was to bridge the gap between the existing procedures in civil and criminal law by providing a civil remedy for a complaint of domestic violence without disrupting the harmony in the family. It was further observed that the scheme of the Act envisages that the complaint by the aggrieved person and the Order to be passed by the Magistrate, would be of civil nature, and if the said Order is violated, it would assume the character of criminality.

30. In light of the Statement of Objects and Reasons, coupled with the observations of the various Courts in this regard, it inevitably leads to the conclusion that the DV Act provides civil remedies which are to be adjudicated essentially by following the civil procedure, but the criminality gets attached in case of violation of any Order made under this Act. The obvious intention is to ensure that the Orders are not defeated with impunity by following the procedure of implementation / execution of the Order under the Code of Civil Procedure. In Order to expedite the execution of the Orders, so that immediate relief can be given to the Complainant, it has been provided that the criminal procedures for implementation of the Order made under DV Act may be resorted to.

31. In this context it would be pertinent to refer to Section 28 of DV Act which provides that the procedure to be followed under this Act. It reads as under:-

"28 Procedure (1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2)Nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23."

32. It is evident from this Section also that the reliefs granted under the Act are civil rights, such as Residence Orders, Monetary Relief, Protection Order Emphasizing Rehabilitation and Welfare. The essence of this Act lies in addressing and safeguarding the civil entitlement. Furthermore, Section 28(2) of the Act is an enabling provision which starts with a non-obstante Clause to provide that nothing in Sub-Section (1) prevents the Courts from laying down its own procedures for disposal of an Application under Section 12 of the Act or Section 23 of the Act.

33. The Bombay High Court in Aniket Subhash Tupe Vs. Mrs. Piyush Aniket Tupe & Anr. 2018 SCC OnLine Bom 601 addressed this very aspect of adducing of evidence by way of Affidavit in proceedings under the DV Act. It referred to Section 28 DV Act and Rule 6(5) of DV Rules, 2006 to observe that recognizing the objective of providing expeditious and speedy relief, the Court is permitted to get the evidence of the witnesses recorded on affidavit, while allowing cross-examination to be done in the Court to test the veracity.

34. The Gujarat High Court in Samirkumar Chandubhai Joshi Vs. State of Gujarat Criminal Application No. 1303 of 2023, also examined the same aspect and concluded that the evidence by way of Affidavit can be presented in the proceedings under the DV Act. It also emphasized that this flexibility aligns with the acts and objective to ensure expeditious and effective relief for an aggrieved woman.

35. In the case of Vijay Kumar Prasad Vs. State of Bihar 2004 (5) SCC 196, the Apex Court noted that Section 12 of DV Act, which was akin to Section 125 Cr.P.C., is also civil in nature and they primarily provide for remedy and protection reliefs.

36. Likewise, a Coordinate Bench of this Court in the case of Ajay Gupta Vs. Sonia Gupta 2020 SCCOnLine Del 2359 considered the same question and held that under the Family Court Act, Courts can accept evidence by way of Affidavit in proceedings under Section 125 Cr.P.C.

37. As already noted above, Section 12 DV Act is akin to Section 125 Cr.P.C. and procedure prescribed in Section 125 Cr.P.C. may be followed for determining the evidence by way of Affidavit in DV Act proceedings also.

38. It may thus, be concluded that the reliefs granted under the DV Act are essentially civil, protective and remedial and the procedure for adjudication of such petitions can be defined by DV Court under S.28 DV Act, in order to effectuate and implement the state Objects and reasons which prompted the enactment of this Act. The reliefs are essentially civil in nature and therefore, the procedure of recording examination in chief by way of Affidavit, cannot be faulted. The criminality essentially kicks in cases in which violation of the remedies of the reliefs granted.

39. It is therefore, held that the Order of the learned MM directing examination in chief of the father to be led by way of Affidavit of evidence, is in accordance with the law and the Rules envisaged under the DV Act. There is no infirmity in the impugned Order dated 25.02.2017.

40. The present Petition and pending Application(s) are accordingly dismissed.

(NEENA BANSAL KRISHNA) JUDGE APRIL 04, 2025/r