

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 4629 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE UMESH A. TRIVEDI

=====

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

=====

KANJIBHAI BHANABHAI PARMAR

Versus

URMILABEN KANJIBHAI PARMAR W/O PREMJBHAI VIRJIBHAI TUNDIYA  
& 2 other(s)

Appearance:

MR AB GATESHANIYA(3766) for the Applicant(s) No. 1  
DS AFF.NOT FILED (R)(71) for the Respondent(s) No. 2  
HCLS COMMITTEE(4998) for the Respondent(s) No. 1  
MS JK HINGORANI(2491) for the Respondent(s) No. 1  
MS MOXA THAKKAR APP (2) for the Respondent(s) No. 3

=====

CORAM: HONOURABLE MR.JUSTICE UMESH A. TRIVEDI

Date : 13/12/2019

ORAL JUDGMENT

1. By way of present petition under Article 226 and/or 227 of the Constitution of India, the petitioner seeks

quashing of the proceedings being Criminal Misc. Application No.42 of 2017 registered with Chief Judicial Magistrate, Surendranagar filed for relief under Sections 19 and 20 of the Protection of Women from Domestic Violence Act (herein after referred to as 'the Act'), by respondent no.1.

2. Mr.A.B.Gateshaniya, learned advocate for the petitioner submitted that the marriage of the petitioner took place with the Respondent No.1 herein somewhere in the year 1984 (approximately before 35 years). The petitioner, in the year 1989, filed Hindu Marriage Petition under Section 9 of the Hindu Marriage Act against the Respondent No.1 herein for restitution of conjugal rights. However, the parties settled their dispute there at that time and obtained customary divorce. Therefore, vide an application Exh.14 in that Hindu Marriage Petition, a settlement pursis was submitted by both of them. It is mentioned in it that customary divorce obtained by them on terms of settlement pursis which is to be abided by both of them. It is further disclosed in it that since there was no possibility to reconcile their differences, they were not in a position to stay together and therefore, they have decided to part their ways. It is further mentioned in it

that nothing remains to be given or taken from each other. There is no right or interest remains over each other.

3. He has further submitted that the said divorce took place in the year 1990 and based on that, Hindu Marriage Petition for restitution of conjugal rights filed by the petitioner came to be disposed of. After about 27 years of the divorce, the Respondent No.1 herein has filed the aforesaid proceedings invoking the provisions of "the Act", that too, long after she remarried with someone else.

4. Therefore, according to Mr. Gateshaniya, learned advocate for the petitioner, the wife is not entitled to file the proceedings under "the Act" against her ex-husband, who is not only divorcee but she has also contracted second marriage with someone else. According to his submission, once she has already contracted second marriage with someone else, she cannot invoke provisions of "the Act" against the petitioner with whom divorce took place before 27 years. At best, she can file proceedings under "the Act" against her existing husband but not ex-husband with whom she got divorce long back. Therefore, he has submitted that proceedings initiated by

her against the petitioner be quashed and set aside, as it is an abuse of process of law.

5. Mr. Gateshaniya, learned advocate for the petitioner to support his assertion that she has contracted second marriage, drawn attention to a copy of FIR filed by her which is at page No.37 of the compilation registered as C.R.No.I-81 of 2014 for an offence under Section 143, 452 and 328 of the Indian Penal Code registered with Joravar Nagar Police Station, Surendranagar, wherein, Respondent No.1 herein has stated her status as wife of one Premjibhai Virjibhai Tundiya as first informant in it. Importantly, in the said FIR, she has stated that all three children are through her wedlock with the applicant who has died before 25 years and therefore, she has remarried with Premjibhai Tundiya. Not only that, pursuant to the filing of the FIR, Sessions Case No.93 of 2014, she was examined as witness there and on oath, she has stated that her husband's name to be Premjibhai Virjibhai Tundiya who is rendering service as member in Dudhrej Surendranagar Nagarpalika. He has further drawn attention to the copy of statement dated 7.7.2014, recorded by police, of Premjibhai Virjibhai Tundiya wherein, Respondent No.1 is referred to as his wife. It is also mentioned in it that respondent No.1 had taken

divorce from the petitioner before 25 years and therefore he had married respondent No.1. Not only that, in a deposition before the Court in Sessions Case, Respondent No.1 herein is referred to as wife of Premjibhai Virjibhai Tundiya. Thus, according to his submission, there is no doubt that after getting divorce from the petitioner, she has remarried. Therefore, it is submitted that for all the purposes under "the Act", petitioner ceased to be responsible to be proceeded under the provisions of "the Act", that too, at the instance of the wife, who has already remarried.

6. He has produced on record the judgment and order passed by the learned Principal Judge, Family Court, Surendranagar, in Criminal Misc. Application No.32 of 2017, seeking maintenance against the petitioner under the provisions of Section 125 of the Code of Criminal Procedure, 1973, which came to be rejected with cost by the Competent Court considering the second marriage of the Respondent No.1 herein with Premjibhai Tundiya. After considering the material evidence produced in that proceedings, it is recorded that she is wife of Premjibhai Tundiya. Therefore, she is not entitled to invoke the provisions of "the Act" against the petitioner. Mr. Gateshaniya, learned advocate for the

petitioner relied on a decision in the case of *Inderjitsingh Grewal V/s. State of Punjab* reported in **2011 (12) SCC 588** for the proposition that, when divorce decree by mutual consent is obtained, no proceedings under Section 12 of the Act could be maintained by the divorced wife on the ground that the decree of divorce was obtained by them i.e. husband and wife playing fraud upon the Court. Still, however, the Supreme Court had quashed the proceedings initiated by the wife under Section 12 of the Act. According to him, he is in a better position that not only customary divorce is obtained by mutual consent but thereafter, she has already remarried.

7. As against that, Ms.Hingorani, learned advocate, as also Ms.Moxa Thakkar, learned APP submitted that considering the provisions made under "the Act", she can invoke provisions as an aggrieved person as she has lived with the petitioner in a domestic relationship in past also. It is further submitted that "the Act" does not prohibit filing of the proceedings by divorced wife. They have further submitted that there is no limitation prescribed for initiation of the proceedings under "the Act" and therefore, it cannot be quashed on the ground of delay as such.

8. Heard the learned advocates for the parties. It is undisputed fact that the Respondent No.1 herein is the divorced wife of the applicant. Respondent No.1 herein has not filed any affidavit disputing the averments made in the present petition. The order passed by learned Principal Judge, Family Court, Surendranagar rejecting application filed under Section 125 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), initiated by the Respondent No.1 herein against the petitioner is also not disputed. Considering the evidence brought before the Family Court it concluded that on 8.7.1990, there is a divorce between the parties. It is further admitted fact recorded in it that both were staying separate since then. Considering the documents in respect of a Criminal Case filed by Respondent No.1 as first informant; wherein, she had referred her status as wife of Premjibhai Tundiya, was also referred to in the order passed by learned Principal Judge, Family Court in the proceedings under Section 125 of 'the Code'. Not only that, in the said FIR very respondent No.1 has mentioned that her husband, namely, Kanjibhai Bhanabhai i.e. present petitioner has died before 25 years, therefore, she has remarried with Premjibhai Tundiya.

9. Learned advocate for the Respondent No.1 herein is unable to controvert the factum of subsisting second marriage between the Respondent No.1 herein and Premjibhai Tundiya.

10. Considering the documents produced and undisputed facts, it is clear that Respondent No.1 is the erstwhile wife of the petitioner who took customary divorce in the year 1990. Her application for order of maintenance under Section 125 of 'the Code', came to be rejected by the Competent Court, after considering the aforesaid undisputed facts. Therefore, one thing is clear that, she has contracted second marriage with Premjibhai Tundiya. The question will then arise, can she invoke provisions of "the Act" against her erstwhile husband when she is already married and staying together contracting second marriage with another man?

11. It would be worthwhile to refer a decision in the case of *Juveria Abdul Majid Patni V/s. Atif Iqbal Mansoori and Another* reported in (2014) 10 SCC 736; wherein, the Supreme Court after analyzing the various provisions of "the Act" concluded that even if divorce takes place after the proceedings under "the Act" is filed, a petition under Section 12 of "the Act" would be

maintainable. It would be profitable to refer certain paragraphs from the judgment as under:

"28. In *Inderjit Singh Grewal* the appellant Inderjit Singh and Respondent 2 of the said case got married on 23-9-1998. The parties to the marriage could not pull on well together and decided to get divorce and, therefore, filed a case for divorce by mutual consent under Section 13-B of the Hindu Marriage Act, 1955. After recording the statement in the said case, the proceedings were adjourned for a period of more than six months to enable them to ponder over the issue. The parties again appeared before the Court on second motion and on the basis of their statement, the District Judge, Ludhiana vide judgment and order dated 20-3-2008 allowed the petition and dissolved their marriage. After dissolution of marriage the wife filed a complaint before the Senior Superintendent of Police, Ludhiana against Inderjit Singh under the provisions of the Domestic Violence Act alleging that the decree of divorce obtained by them was a sham transaction. It was further alleged that even after getting divorce both of them had been living together as husband and wife. In the said case, the Superintendent of Police, City I conducted the full-fledged inquiry and reported that the parties had been living separately after the dissolution of the marriage. Hence, no case was made out against Inderjit Singh. In this context, this Court held that Section 12 "application to Magistrate" under the Domestic Violence Act challenging the said divorce was not maintainable and in the interest of justice and to stop the abuse of process of court, the petition under Section 482 Cr.PC was allowed. The law laid down in the said case is not applicable for the purpose of determination of the present case."

29. In the present case, the alleged domestic violence took place between January, 2006 and 6-9-2007 when FIR No.224 of 2007 was lodged by the appellant under Sections 498-A and 406 IPC against the first respondent and his relatives. In a writ petition filed by the first respondent the High Court refused to quash the said FIR against him observing that prima-facie case under Section 498-A was made out against him. Even if it is accepted that the appellant during the pendency of the SLP before this Court has obtained ex parte "khula" (divorce) under the Muslim Personal Law From the Mufti on 9.5.2008, the petition under Section 12 of the Domestic Violence Act, 2005 is maintainable.

"30. An act of domestic violence once committed, subsequent decree of divorce will not absolve the liability of the respondent

from the offence committed or to deny the benefit to which the aggrieved person is entitled under the Domestic Violence Act, 2005 including monetary relief under Section 20, child custody under Section 21, compensation under Section and interim or ex parte order under Section 23 of the Domestic Violence Act, 2005."

31. Both the Sessions Judge and the High Court failed to notice the aforesaid provisions of the Act and the fact that the FIR was lodged much prior to the alleged divorce between the parties and erred in holding that the petition under Section 12 was not maintainable.

12. Since the case of *Juveria Abdul Majid Patni (supra)* referred to the case of *Inderjitsingh Grewal (supra)* cited by the petitioner, there is no need to separately deal with the same.

13. The crux of the matter in the case of *Juveria Abdul Majid Patni (supra)* was very clear that once the act of domestic violence committed and proceedings under "the Act" is filed subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled under "the Act" including monetary relief. But question still remains to be answered is when the parties have obtained divorce, provision of "the Act" can be invoked subsequent thereto or not. Whether after remarriage is the aggrieved party entitled to file proceeding under "the Act" against former husband?

14. However, where divorce took place nearly about 28 years before and wife remarries thereafter, can she invoke provisions of “the Act” would be the issue to be addressed?

15. To decide the controversy in this case, it would be profitable to refer certain Sections of “the Act”:

*2(a) “aggrieved person” means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent*

*2(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 relationship in the nature of marriage, adoption or are family members living together as a joint family;*

Considering the definition of an aggrieved person, it is clear that a woman who is, or has been, in a domestic relationship with the respondent can invoke the provisions of “the Act”. Again referring the definition of domestic relationship, it is clear that it is a relationship, which is alive between the persons.

Even on separation or staying apart, marital relationship still continues. Once the marital tie is severed by way of divorce between the parties the relationship between them is snapped. Considering the definitions, as aforesaid, it is clear that the wife would be aggrieved person so long as domestic relationship survives. As soon as it is snapped, it is an end to the domestic relationship and she would not be aggrieved person then. Thus, after divorce between two persons, neither the domestic relationship survives nor any person would be termed as an aggrieved person for the purpose of this Act. Hence, after divorce takes place between husband and wife, the provisions under "the Act" cannot be invoked. Things would be different if the provisions are invoked and thereafter divorce takes place. The said situation is covered by the decision of the Supreme Court in the case of *Juveria (Supra)*. In short, in my opinion, divorced wife cannot invoke the provisions of "the Act". So far as the present case is concerned, even if the divorced wife is entitled to invoke the provisions of "the Act", respondent no.1 – wife, after getting divorce from the petitioner, 28 years before, contracting second marriage with Premjibhai Tundia, the domestic relationship with the erstwhile husband is not subsisting, and therefore, in no case, respondent No.1

wife can invoke the provisions of “the Act”. Thus, there is irresistible conclusion that divorced wife who has remarried cannot invoke provisions of “the Act” against her erstwhile husband.

16. Therefore, this petition deserves to be allowed and is, accordingly, allowed. Criminal Misc. Application No.42 of 2017 pending before the Court of Chief Judicial Magistrate, Surendranagar filed by Respondent No.1 herein against the petitioner invoking provisions of the Act is hereby quashed and set aside. Rule is made absolute.

ASHISH M. GADHIYA

(UMESH A. TRIVEDI, J)

