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ABC 2017 (I) 217 BOM  
ACQUITTAL & BAIL CASES  
HIGH COURT OF BOMBAY

(Indira K. Jain, J.)

Criminal Application [Apl] No.664 of 2011

Decided on 20 January, 2017

b Nagpur Bench

GAUTAM JAIRAM GAWAI - Applicant(s).

Versus

c RAGINI GAUTAM GAWAI & ANR. - Respondent(s).

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Law Covered:- (A) Code of Criminal Procedure, 1973 – Section 125 – Family Courts Act – Section 26 – Protection of Women from Domestic Violence Act, 2005 – Section 20 – Respondent not a legally wedded wife – No proof regarding dissolution of first marriage of respondent – Maintenance to minors – name of father of child tried to be rectified – Second child – No convincing evidence to show that he was born to respondent from applicant – Held, case of the respondent is completely out of purview of the provisions of Section 125, CrPC & DV Act – Order quashed. (Para 13 & 14)

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(B) Protection of Women from Domestic Violence Act, 2005 – Provisions of – Attraction of – Live in relationship – Essential requirements – Held, applicant must not only to show existence of live-in-relationship with the non-applicant – which is akin to a marriage visible from the fact that applicant & non-applicant are living together as husband and wife – but also should show that they are otherwise legally qualified to marry. (Para 10)

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(C) Protection of Women from Domestic Violence Act, 2005 – Section 2(f) – Attraction of – Qualification for – A woman, who is married, cannot enter into a domestic relationship as contemplated under Section 2 (f). (Para 10)

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(D) Protection of Women from Domestic Violence Act, 2005 – Section 2(f) – Protection under – Married woman in domestic relation with other man – Held, even if, she is successful in establishing a long standing relationship with the man, she would not be entitled to protection under the provisions of the Domestic Violence Act. (Para 10)

(E) *Protection of Women from Domestic Violence Act, 2005 – Section 2(f) – Domestic relationship – Dissolution of first marriage of respondent – Deed of dissolution – non production of – Held, in the absence of proof regarding dissolution of first marriage of respondent – Provisions of DV Act not attracted. (Para 11)* a

(F) *Protection of Women from Domestic Violence Act, 2005 – Section 2(f) – Domestic relationship – Married non-applicant – Domestic relation not valid – Provisions of DV Act not attracted. (Para 11)* b

(G) *Protection of Women from Domestic Violence Act, 2005 – Section 26 – Relief in other suits and legal proceedings – (1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act – (2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court – (3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief. (Para 12)* c d

(H) *Protection of Women from Domestic Violence Act, 2005 – Section 26 – Relief in other suits and legal proceedings – Held, the court would not be empowered to grant the relief unless sought. (Para 12)* e

(I) *Protection of Women from Domestic Violence Act, 2005 – Section 26 – Suo motu considering the application under – Held, it was obligatory on the part of the Family Court to hear the non-applicant before awarding maintenance under Section 26, DV Act – Opportunity to non-applicant clearly denied. (Para 12)* f

(J) *Code of Criminal Procedure, 1973 – Section 125 – Family Courts Act – Section 26 – Protection of Women from Domestic Violence Act, 2005 – Section 26 – Respondent not a legally wedded wife – Held, family Court failed to hear the non-applicant before awarding maintenance u/s 26 – respondent failed to establish that she entered into domestic relationship – or she was legally married to non-applicant – she was not entitled to relief of maintenance either under Section 125, CrPC or provisions of the DV Act. (Para 12)* g h

**Facts:-** Respondent no.1 claiming herself to be the wife of applicant, filed an application u/s 125, CrPC before the Family Court. She pleaded that she was married to applicant. They had two sons born out of the said wedlock. According to respondent the applicant started treating her as maid servant. He started harassing her and ultimately left the house, not to return forever. She made efforts to find out his whereabouts. She was not successful and so she informed about the same to the Superintendent of Police. According to respondent, both the children were studying in English Medium School and she was unable to maintain herself. She, therefore, claimed maintenance for herself and the children.

Applicant appeared in the proceedings and contested the same. He denied marriage between him and the respondent. According to applicant, he was already married and blessed with three children. His marriage was still subsisting. His further submission was that respondent was a legally wedded wife of another person. He contended that on false grounds, application for maintenance came to be filed and prayed to reject the same.

On appreciation of evidence, Family Court came to the conclusion that the respondent was not the legally wedded wife of the applicant. However, keeping in view the object of the provisions relating to maintenance, the learned Judge thought it appropriate to consider the prayer for maintenance under Section 26 of the Family Courts Act and awarded maintenance at the rate of Rs.1500/- per month to the applicant.

In another proceeding, respondent presented an application under the provisions of the Domestic Violence Act claiming relief of protection order, monetary relief and compensation. This application was presented almost on the same grounds on which an application under Section 125 of the Code of Criminal Procedure was filed by her. Considering the evidence, the learned Judicial Magistrate, First Class, partly allowed the application and granted maintenance at the rate of Rs.2000/- per month to the applicant under Section 20 of the Domestic Violence Act. The order was carried in appeal before the District Court and the impugned judgment was stayed, subject to condition of depositing 50% of the outstanding amount.

It was found that the case of the respondent is completely out of purview of the provisions of Section 125 of CrPC and the provisions of Domestic Violence Act. The order of the Family Court was quashed and set aside.

**Law of relief:-** It is obligatory on the part of the Family Court to hear the non-applicant before awarding maintenance u/s 26 DV Act.

**Held:-** With the assistance of the learned counsel for the parties, this court has gone through the reasons recorded by the learned Judge of the Family Court, learned Judicial Magistrate, First Class and the learned Adhoc Additional Sessions Judge. Needless to state that to attract the provisions of Domestic Violence Act, applicant must not only to show existence of live-in-relationship with the non-applicant which is akin to a marriage visible from the fact that applicant and non-applicant are living together as husband and wife but also should show that they are otherwise legally qualified to marry. A woman, who is married, cannot enter into a domestic relationship as contemplated under Section 2 (f) of the Domestic Violence Act, and even if, she is successful in establishing a long standing relationship with the man, she would not be entitled to protection under the provisions of the Domestic Violence Act. The cases referred by the learned counsel for applicant reiterate the well settled propositions of law in this regard. (Para 10)

In the case on hand, so far as the domestic relationship between applicant and respondent is concerned, applicant could not establish the same as required under Section 2 (f) of the Domestic Violence Act. Though she states that her previous marriage with Shamrao Ambhore was dissolved by a deed of dissolution, she could not prove the said deed of dissolution in accordance with the law. Once respondent admits her marriage with Shamrao Ambhore in the year 1995, it was for her to prove that after dissolution of the said marriage, she married to non-applicant or enter into domestic relationship with non- applicant. In the absence of proof regarding dissolution of first marriage of respondent Ragini, the courts below committed serious error in holding that she entered into domestic relationship with the non-applicant whose first marriage with Suvarna was also in existence on 11.5.1997. (Para 11)

As stated above, Family Court has held that Ragini was not the legally wedded wife of Gautam Gawai and proceeded to consider the application under Section 125 of the Code of Criminal Procedure under Section 26 of the Family Courts Act and awarded maintenance to her. The provisions of Section 26 of the Protection of Women from Domestic Violence Act, 2005 read thus -

26. Relief in other suits and legal proceedings :- (1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal

a      court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

b      (2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

c      From the careful reading of the above said provisions, it is apparent that the court would not be empowered to grant the relief unless sought. In the present case, it appears that at the time of delivering judgment, the court suo motu considered the application under section 26 of the Domestic Violence Act thereby clearly denying an opportunity to non- applicant to meet with the same. d      It was obligatory on the part of the Family Court to hear the non-applicant before awarding maintenance under Section 26 of the Domestic Violence Act. Since the Family Court failed for the same and since the applicant/present non-applicant failed to establish that she entered into domestic relationship or she was legally married to non-applicant, she was not entitled to relief of maintenance either e      under Section 125 of the Code of Criminal Procedure or under the provisions of the Domestic Violence Act. (Para 12)

f      So far as maintenance to minors is concerned, it can be seen from the municipal record that name of father of Vaibhav was initially shown as Sanjay and later on tried to be rectified as Gautam. Regarding Nipun, there is no convincing evidence to show that he was born to respondent from applicant. Exh.28 is considered as a letter by applicant to S.D.P.O. and reliance is placed on the admissions therein. On cursory look at Exh.28, it can be seen that on g      1.1.2010, S.D.P.O. recorded statement of applicant in the course of enquiry. Applicant has not admitted the statement. In the absence of unequivocal admission on the part of applicant Gautam and for want of legal proof, reliance could not have been placed on contents of Exh.28 to fasten paternity of children on him. (Para 13)

h      In the above circumstances, this court finds that the case of the respondent is completely out of purview of the provisions of Section 125 of the Code of Criminal Procedure and the provisions of

Domestic Violence Act. As impugned orders suffer from material legal infirmities, interference in extra-ordinary jurisdiction is warranted. (Para 14) a

**Counsel:-** For Appellant(s): Shri Rahul Dhande, Advocate.

For Respondent(s): Shri A. Malnas, Advocate holding for Shri A.J. Mirza, Advocate & Shri M.J. Khan, A.P.P. b

### **JUDGMENT**

**KUM. INDIRA JAIN, J.:** - By these applications under Section 482 of the Code of Criminal Procedure, applicant has assailed the judgment and order of the Family Court, Akola in Petition No.E-82/2010 passed on 21.10.2011, order dated 31.12.2014 passed by the Judicial Magistrate, First Class, Akola in Miscellaneous Criminal Case No.949/2010 and order dated 18.3.2015 passed by the Adhoc Additional Sessions Judge, Akola in Criminal Appeal No.11/2015. c

2. Heard the learned counsel for the parties. Since common questions of facts and law arise in these two applications, they are disposed of by common judgment. d

3. The facts giving rise to the applications may be stated, in brief, as under :

Respondent no.1 claiming herself to be the wife of applicant, filed an application under Section 125 of the Code of Criminal Procedure before the Family Court, Akola. She pleaded that she was married to applicant Gautam Gawai on 11.5.1997. They have two sons Vaibhav and Nipun born out of the said wedlock. According to respondent Ragini, till Diwali 2009, they led happy married life. After Diwali-2009, quarrel between respondent and applicant started and applicant used to treat her as maid servant. He started harassing her and ultimately left the house, not to return forever. She made efforts to find out his whereabouts. She was not successful and so she informed about the same to the Superintendent of Police. According to respondent, both the children were studying in English Medium School. She was unable to maintain herself. She, therefore, claimed maintenance for herself and the children. e f g

4. Applicant appeared in the proceedings and contested the same. He denied marriage between him and respondent Ragini. According to applicant, he was married to Suvarna on 9.5.1990. The couple were blessed with three children. Marriage between applicant h

a and Suvarna still subsists. Further submission is that respondent is a legally wedded wife of one Shamrao Bhopaji Ambhore and her marriage was solemnized on 01.03.1995 under the provisions of the Special Marriage Act. He contended that on false grounds, application for maintenance came to be filed and prayed to reject the same.

b 5. On appreciation of evidence, Family Court came to the conclusion that Ragini was not the legally wedded wife of Gautam Gawai. However, keeping in view the object of the provisions relating to maintenance, the learned Judge thought it appropriate to consider the prayer for maintenance under Section 26 of the Family Courts Act and awarded maintenance at the rate of Rs.1500/- per month to the applicant. It is this order which is the subject matter of Criminal Application No.664/2011.

c 6. In another proceeding, respondent presented an application under the provisions of the Protection of Women from Domestic Violence Act, 2005 (In short "Domestic Violence Act") claiming relief of protection order, monetary relief and compensation. This application was presented almost on the same grounds on which an application under Section 125 of the Code of Criminal Procedure was filed by her. Considering the evidence, the learned Judicial Magistrate, First Class, partly allowed the application and granted maintenance at the rate of Rs.2000/- per month to the applicant under Section 20 of the Domestic Violence Act. The order was carried in appeal before the District Court, Akola. Applicant preferred an application seeking stay to the judgment and order passed in Misc. Criminal Case No.949/2010. Vide order dated 18.3.2015, the learned Adhoc Additional Sessions Judge, Akola allowed the application and stayed the impugned judgment, subject to condition of depositing 50% of the outstanding amount within one month from the date of order, with further condition that non-compliance of the same, would result into automatic end to the stay order. The order passed by the learned Judicial Magistrate, First Class and the order on Exh.5 passed by the learned Adhoc Additional Sessions Judge are the subject matter of Criminal Application No.229/2015.

h 7. Learned counsel Shri Dhande submits that marriage between applicant and respondent is in dispute. Family Court has categorically held that there was no legal marriage between applicant and respondent. He submits that respondent could not establish dissolution of marriage in accordance with the law and in such

circumstances, respondent was not entitled for maintenance under Section 125 of the Code of Criminal Procedure.

8. Regarding protection under the Domestic Violence Act, learned counsel submitted that domestic relationship between applicant and respondent is not established and in the absence of proof of domestic relationship, respondent was not entitled to any protection under the provisions of the Domestic Violence Act. In support of the submissions, learned counsel placed reliance on the decisions of the Hon'ble Supreme Court in *D. Velusamy .vs. D. Patchaiammal (2010 (10) SCC 469 and of this Court in the case of Shri Ambadas Gangadhar Shetye .vs. Malabai Ambadas Shetye and another (2013 BCI 535)*. Reliance is also placed on the judgment dated 27.1.2015 passed by this Court in Criminal Writ Petition No.773/2014.

9. Per contra, learned counsel for respondent strongly supports the order impugned in both the applications. It is submitted that strict proof of legal marriage is not required in the proceeding under Section 125 of the Code of Criminal Procedure and so far as the protection under the Domestic Violence Act is concerned, this is an admitted fact that for a long long years, applicant and respondent resided together and they have two children out of the said relationship. The learned counsel submits that in such a situation no interference is required in extra-ordinary jurisdiction and prays to reject the applications.

10. With the assistance of the learned counsel for the parties, this court has gone through the reasons recorded by the learned Judge of the Family Court, learned Judicial Magistrate, First Class and the learned Adhoc Additional Sessions Judge. Needless to state that to attract the provisions of Domestic Violence Act, applicant must not only to show existence of live-in-relationship with the non- applicant which is akin to a marriage visible from the fact that applicant and non-applicant are living together as husband and wife but also should show that they are otherwise legally qualified to marry. A woman, who is married, cannot enter into a domestic relationship as contemplated under Section 2 (f) of the Domestic Violence Act, and even if, she is successful in establishing a long standing relationship with the man, she would not be entitled to protection under the provisions of the Domestic Violence Act. The cases referred by the learned counsel for applicant reiterate the well settled propositions of law in this regard.

11. In the case on hand, so far as the domestic relationship between applicant and respondent is concerned, applicant could not establish the same as required under Section 2 (f) of the Domestic Violence Act. Though she states that her previous marriage with Shamrao Ambhore was dissolved by a deed of dissolution, she could not prove the said deed of dissolution in accordance with the law. Once respondent admits her marriage with Shamrao Ambhore in the year 1995, it was for her to prove that after dissolution of the said marriage, she married to non-applicant or enter into domestic relationship with non- applicant. In the absence of proof regarding dissolution of first marriage of respondent Ragini, the courts below committed serious error in holding that she entered into domestic relationship with the non-applicant whose first marriage with Suvarna was also in existence on 11.5.1997.

12. As stated above, Family Court has held that Ragini was not the legally wedded wife of Gautam Gawai and proceeded to consider the application under Section 125 of the Code of Criminal Procedure under Section 26 of the Family Courts Act and awarded maintenance to her. The provisions of Section 26 of the Protection of Women from Domestic Violence Act, 2005 read thus -

**26. Relief in other suits and legal proceedings :- (1)**

Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

From the careful reading of the above said provisions, it is apparent that the court would not be empowered to grant the relief unless sought. In the present case, it appears that at the time of delivering judgment, the court suo motu considered the application

under section 26 of the Domestic Violence Act thereby clearly denying an opportunity to non- applicant to meet with the same. It was obligatory on the part of the Family Court to hear the non- applicant before awarding maintenance under Section 26 of the Domestic Violence Act. Since the Family Court failed for the same and since the applicant/present non-applicant failed to establish that she entered into domestic relationship or she was legally married to non-applicant, she was not entitled to relief of maintenance either under Section 125 of the Code of Criminal Procedure or under the provisions of the Domestic Violence Act.

13. So far as maintenance to minors is concerned, it can be seen from the municipal record that name of father of Vaibhav was initially shown as Sanjay and later on tried to be rectified as Gautam. Regarding Nipun, there is no convincing evidence to show that he was born to respondent from applicant. Exh.28 is considered as a letter by applicant to S.D.P.O. and reliance is placed on the admissions therein. On cursory look at Exh.28, it can be seen that on 1.1.2010, S.D.P.O. recorded statement of applicant in the course of enquiry. Applicant has not admitted the statement. In the absence of unequivocal admission on the part of applicant Gautam and for want of legal proof, reliance could not have been placed on contents of Exh.28 to fasten paternity of children on him.

14. In the above circumstances, this court finds that the case of the respondent is completely out of purview of the provisions of Section 125 of the Code of Criminal Procedure and the provisions of Domestic Violence Act. As impugned orders suffer from material legal infirmities, interference in extra-ordinary jurisdiction is warranted.

Hence, the following order.

(1) Criminal Application (APL) No.664/2011 is allowed The impugned order dated 21.10.2011 in Petition No.E.82/2010 passed by the Family Court, Akola is quashed and set aside. Rule is made absolute in the aforesaid terms. No order as to costs.

(2) Criminal Application (APL) No.229/2015 is allowed.

Rule is made absolute in terms of prayer clauses (a)-(i), (ii) and (iii). No order as to costs.

**Result:-** Criminal Application (APL) Nos. 664/2011 and 229/2015 allowed