

IN THE COURT OF JUDGE SMALL CAUSES/JMFC SRINAGAR

Case No: 3722349/2019
CNR No. JKSG03-000850-2019
Date of Institution: 26/02/2019
Date of Order: 16/12/2021

Shamshada Akhter W/O Ajaz Parvaiz Shah
R/O 22-K Shah Anwar Colony Hyderpora, Srinagar
...Aggrieved Person
Through: Mr. Ishtiaq Ahmad Khan, Advocate

V e r s u s

Ajaz Parvaiz Shah S/O Late Shamus-din Shah
R/O Shah Anwar Colony, Hyderpora, Srinagar
...Respondent
Through: Mr. Shabir Bhat & Farhat Rashid, Advocates

In the matter of: Application on behalf of applicant/AP for unconditional withdrawn of the above titled petition.

CORAM: FAYAZ AHMAD QURESHI (JO CODE: JK00169)

O R D E R

1. The above titled matter was pending before Ld JMFC/Special M.M. PT&E Srinagar which came to be transferred to this court by the order of Hon'ble High Court of J&K And Ladakh at Srinagar vide Order dated 03.12.2021 and this court has been directed to dispose off the proceedings with reasonable dispatch. This is how this matter has reached this court which was pending between the parties since 22.02.2019.

2. The AP moved the instant application to withdraw the petition U/S 12 of D.V.Act for personal reasons unconditionally. However, the respondent has filed detailed objections to the application seeking withdrawal of the instant petition which are re-produced below:-

The respondent/non-applicant would take exception to the application of the petitioner/applicant seeking withdrawal of the petition filed under the provisions of Protection of Women from Domestic Violence Act. It would be not only relevant but also profitable to give a brief resume to the facts and circumstances of the case and the approach of the petitioner in the matter.

Brief Resume of the Case:

- I. The above titled case came to be filed by the petitioner before this Hon'ble Court on 26.02.2019 alleging domestic violence at the hands of the answering respondent. An ex parte order on the same day came to be passed directing the concerned SHO to file a report and then in terms of order dated 23.03.2019 this Hon'ble court was pleased to restrain the answering respondent from entering into his own residential house. Under the garb of said order the petitioner with the help of her relatives threw the respondent out from his own residential house and then used the police agency to further harass the respondent. This way the respondent who has constructed the said residential house out of his hard earned money became homeless.
- II. The order dated 23.03.2019 passed by this Hon'ble Court came to be modified in terms of order dated 29.04.2019 thereby providing that both the parties shall accommodate each other in a cordial and friendly relation in the house where the parties were residing before the dispute and the wife *Shamshada Akhter* shall provide accommodation of two rooms to the husband *Aijaz Parvaiz Shah* in the said house.

- III. The petitioner preferred an appeal before the Hon'ble Principal District Judge Srinagar which came to be transferred to the Additional District Judge Srinagar. The appeal came to be dismissed on 24.02.2020.
- IV. The petitioner filed a petition before the Hon'ble High Court of J&K under Section 482 CrPC challenging the legality of the order of this Hon'ble Court dated 29.04.2019 and the order passed by the Appellate Court dated 24.02.2020. The Hon'ble High Court dismissed the petition of the petitioner herein in terms of order dated 03.03.2020.
- V. The petition filed under Section 482 CrPC having been dismissed, the respondent, therefore, filed an application before this Hon'ble Court seeking implementation of the order dated 29.04.2019 and vide order dated 11.03.2020 this Hon'ble Court was pleased to provide a Scheme for implementation of the Court order while observing that the order of the Court is not passed just as ritual and that it is the duty of the Court to see the orders passed, are implemented in letter and spirit. This Hon'ble Court accordingly directed the SHO P/S Budgam to implement the order dated 29.04.2019 with the further direction for installation of CCTV Cameras both inside the lobbies and in the compound of the residential house of the respondent having regard to the privacy of the parties.
- VI. The petitioner on 13.03.2020 filed a Transfer application before the court of Hon'ble Chief Judicial Magistrate Srinagar seeking transfer of the above titled petition while leveling frivolous allegations against the Presiding Officer of this Hon'ble Court and on 14.03.2020 filed an Appeal before the Hon'ble Court of

Principal District and Sessions Judge Srinagar against the order of this Hon'ble court dated 11.03.2020. The Hon'ble Court of CJM Srinagar refused to pass any order in favour of the petitioner and disposed of the transfer application vide order dated 12.12.2020. in the meanwhile the appeal preferred by the petitioner against the order dated 11.03.2020 passed by this Hon'ble Court also came to be dismissed vide order dated 23.10.2021. Pertinently while dismissing the Appeal the Hon'ble Court of Principal Sessions Judge Srinagar made observations regarding the conduct of the petitioner/appellant by observing in Para 14 of the order that the appellant/petitioner has dragged the matter since 2019 and is reported to have divested the respondent from his home, wherein she had prayed to be protected, particularly with regard to the shared accommodation and that the appellant/petitioner under the garb of her grievance with regard to shared accommodation has dispossessed the respondent from his own house.

- VII. The petitioner did not leave it there but filed a Letters Patent Appeal assailing the order of the Ld. Single Bench of the Hon'ble High Court dated 03.03.2020 and order passed by the Appellate Court dated 24.02.2020 as also the order passed by this Hon'ble Court dated 29.04.2019. The petitioner lost the Letters Patent Appeal as well, as the same came to be dismissed in terms of a landmark judgment dated 16.08.2021.
- VIII. The petitioner with a view not to comply the order of this Hon'ble court dated 29.04.2019 dragged the respondent to the Hon'ble Supreme Court by filing SLP bearing No.8415/2021 challenging all the orders of the Courts below. The SLP of the petitioner also came to be dismissed on 12.11.2021.

IX. The order of this Hon'ble Court dated 29.04.2019 having been confirmed firstly by the Appellate Court, then by Single Bench of the Hon'ble High Court in petition under 482 CrPC and Hon'ble Division Bench of the Hon'ble High Court in LPA and then finally by the Hon'ble Supreme Court in SLP prompted the respondent to file an application before this Hon'ble court seeking implementation of the order dated 29.04.2019 read with order dated 11.03.2020 passed by this Hon'ble Court and this Hon'ble Court vide order dated 15.11.2021 directed the concerned SHO to implement the order dated supra in letter and spirit. It is under these circumstances that the petitioner has filed the withdrawal application under reply.

Objections to withdrawal application:

1. That the application filed by the petitioner seeking withdrawal of the petition is not only misconceived and misdirected in nature but is also visited by *mala-fides*. The petitioner under the garb of the order dated 23.03.2019 passed by this Hon'ble Court in the above titled petition dispossessed the respondent from his own residential house and now the petitioner by seeking to withdraw the petition desires to maintain such position and avoid implementation/compliance of the order dated 29.04.2019 which directs the petitioner to provide two rooms to the respondent in the residential house. Therefore, before the order of this Hon'ble Court is implemented in letter and spirit and the position which prevailed prior to passing of the order dated 23.03.2019 is not restored, the petitioner in law cannot withdraw the petition thereby render the orders of this Hon'ble Court redundant. In view of the peculiar circumstances of the case the petition cannot be even dismissed in

default and for want of prosecution unless the order dated 29.04.2019 passed by this Hon'ble Court is not implemented.

2. That it is the petitioner who dragged the respondent to this Hon'ble Court and then to other Courts of Law and in the process caused serious prejudice to the rights and interests of the respondent by resorting to false pleas and misusing the process of Courts. It is the submission of the respondent that the present case is the fit case in which action under law is warranted against the petitioner for not only misusing the law to the disadvantage of the respondent but also the orders of this Hon'ble Court. As such, the application seeking withdrawal of the petition at this stage is not legally tenable.
3. That the legal maxim '*Actus Curiae Neminem Gravabit*' (An act of court shall prejudice no man) holds ground in the facts and circumstances of the present case and if the petitioner is allowed to withdraw the petition at this stage it would be the act of the court which shall cause prejudice to the respondent / non-applicant. It is submitted that the petitioner having lost the legal battle up to the Hon'ble Apex Court very cleverly desires to keep the respondent at bay by avoiding implementation of the Hon'ble court order dated 29.04.2019. As such, the application seeking withdrawal of the petition is not an withdrawal application simpliciter but a design to make redundant not only the order of this Hon'ble Court but also the orders of the Appellate Court, High Court and the Hon'ble Supreme Court.
4. That the application filed by the petitioner seeking withdrawal of the petition points towards the vexatious litigation initiated by the petitioner against the respondent by leveling false and frivolous

allegations of Domestic Violence against the respondent. It is in the interest of the Constitutional Scheme of the Country that the litigants who take resort to frivolous and vexatious litigation need to be dealt with heavy hands and nobody shall be allowed to misuse the law and process of courts.

5. Heard Ld Counsels for both the sides. It is contended by Ld counsel for the applicant that it is the choice of the applicant to proceed with or withdraw the petition under D.V.Act and the other-side cannot raise any objection, if the same is withdrawn. Ld Counsel submits that Section 28 lays down that for disposal of petition U/S 12 and some other provisions, the provisions of CrPC will apply. Besides, he submits that if the proceedings are treated to be civil then Order 23 of CPC empowers the applicant to withdraw the petition. Moreover, Ld Counsel for the applicant/AP contends that D.V.Act gives right to a woman/wife to take benefit of the provisions of D.V.Act and not to the husband and so the application of the other-side which has been treated as objections to the petition of the AP, cannot be treated as counter petition U/S 12 and so the objection of the other-side be over-ruled. Ld Counsel also contends that even if, the AP has challenged the order dated 29.04.2019 passed by this court whereby both the husband and wife were directed to accommodate each other in a cordial and freely relation in the house but that will not preclude the AP to withdraw the petition in which such order has been passed even if, the same has been confirmed in appeal and subsequent petitions U/S 482 & LPA before Hon'ble High Court of J&K and Special Leave Petition before the Hon'ble Apex Court of the country have been dismissed.

6. *Per contra*, Mr. Shabir Ahmad Bhat, Advocate contends that the intention of the AP is not to withdraw the petition for any other reason but to

frustrate the Order dated 29.04.2019 and subsequent order of implementation through police station which has not only been confirmed by Hon'ble Appellate Court in appeal preferred U/S 29 of D.V.Act but in petition U/S 482 and then LPA and ultimately before the Hon'ble Supreme Court where special leave petition was presented. Ld Counsel for the respondent submits that because of the orders obtained from this court the AP has deprived the respondent from enjoying the shared-household which belong to the respondent and respondent has been restrained from entering into his own house. Under the garb of the order, the AP with the help of her relatives threw the respondent out from his own residential house and then used police agency to further harrass the respondent. It is also contended that once order of the competent court was confirmed in appeal and later in petition U/S 482 and then LPA, the respondent preferred an application before the same court seeking implementation of Order dated 29.04.201. The Hon'ble court vide Order dated 11.03.2020 directed implementation of the order in letter and spirit and directed SHO P/S Budgam to implement the same with further direction to install CCTV cameras inside the lobby and in the compound of the residential house of the respondent having regard to the privacy of the parties. However, the AP preferred one transfer petition before Ld Chief Judicial Magistrate, Srinagar leveling frivolous allegations against the Presiding Officer of that court. The AP also challenged Order dated 11.03.2020 before Hon'ble Court of Principal Sessions Judge, Srinagar and the appeal came to be dismissed vide Order dated 23.10.2021 with strong observations in para 14 of the order of Appellate Court. It is further contended that the petitioner/AP was not satisfied despite availing all the remedies upto the Division Bench of Hon'ble High Court of J&K and then dragge the repondent to Hon'ble Supreme Court by filing SLP bearing No.8415/2021 but the same came to be dismissed on 12.11.2021. It is

contended that after dragging the respondent in the instant petition upto Hon'ble Supreme Court the respondent is withdrawing the instant petition simply to frustrate the orders passed in favour of the respondent and to avoid implementation of the same. Therefore, Ld Counsel for the respondent prays that Order dated 29.04.2019 be implemented through the agency of police and if the petition is allowed to be withdrawn, the order be implemented against AP and she be burdened with heavy costs to compensate the respondent who has been traumatized by restraining him from entering his own house by abuse of the process of court. Moreover, it is submitted that no ground has been disclosed in the application as to why the AP wants to withdraw the instant petition.

7. Considering the rival contentions of the parties and for proper disposal of the instant petition, it is important to give precise resume of the instant petition.

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1. The petition U/S 12 of D.V.Act came to be preferred on 26.02.2019 before Ld JMIC/PT&E.

2. On 25.02.2019, the court sent the complaint to concerned P/S for investigation and report.

3. On 23.03.2019, another application came to be presented in which the court of Ld PT&E directed issuance of notice to other-side and directed non-applicant not to resort to any kind of violence directly or indirectly, whether physically or mentally against the applicant/complainant and **the respondent has also been restrained from entering into the residential house of the applicant/petitioner and also from communicating with the applicant by any means or mode**

or through his relatives, agents or goons. Besides, SHO of concerned P/S is directed to assist in implementation of the order. Subsequently, the respondent appeared and filed an application which came to be treated as objections to the petition filed by AP.

4. On 29.04.2019, the court of Ld PT&E passed an order whereby directed both the parties to accommodate each other and live peacefully which came to be challenged by AP by virtue of appeal U/S 29 of D.V.Act before Ld Additional District Judge, Srinagar and the appeal came to be dismissed by Order dated 24.02.2020. Both the orders of trial court and appellate court came to be challenged by virtue of petition U/S 482 which too came to be dismissed. LPA was preferred but the AP failed there as well. Ultimately, the matter landed in Hon'ble Supreme Court where the AP preferred SLP which too has been dismissed.

8. Before proceeding further it is important to note that Hon'ble Appellate Court of Ld Additional Sessions Judge, Srinagar in Order dated 24.02.2020 has made certain observations which are important to be quoted for efficacious disposal of instant matter:

“10.....The perusal of the record of the trial court would reveal that the Ld Trial Judge has taken that view in consideration and has not separately diarized or registered the complaint laid by the respondent rather in the order impugned, the Ld Trial Judge has clubbed both the petitions that is one filed by the petitioner wife and the second filed by the respondent and the later's

complaint has been treated as objections to the complaint laid by the Appellant.

11. In that view of the matter no exception can be taken to the procedure adopted by Ld Trial court to that extent. Because once the complaint was filed by the appellant the respondent has right to rebut the allegations leveled in the complaint so instead of having filed separate complaint, he was required to file objections, hence by treating his complaint as objections, no illegality has been committed by the court. While treating his petition as objections against the case of appellant.

9. Likewise, in para 18 & 21 of Order dated 24.02.2020, the Hon'ble Court has observed as:-

“18..... Admittedly the house in question is jointly owned by both the parties though the parties are at variance as to how much they have contributed towards the raising of the house. But it is not denied that they have been in matrimonial relationship for last more than 30 years. They were living together in the said house as husband and wife which is a domestic relationship.”

21. While drawing the order impugned Ld Trial Magistrate has considered the application of the wife and also the objections laid by the husband and came to the conclusion that both the parties should

accommodate each other in cordial, friendly relation in the house. Because in that house they lived together as husband and wife. The wife shall provide accommodation of 02 rooms to the husband and the later would undertake to live peacefully in the house without creating any sought of crueltyt directly or indirectly. Which order in the present circumstances cannot be termed to be erroneous or against factual position. This is because from the very reading of the petition filed by the appellant and the enquiry report which the Ld Magistrate had directed to be conducted by the SHO P/S concerned. That enquiry does not reveal prima-facie any material of grave physical or mental violence being caused to the appellant. Parties appeared to have matrimonial discard. But that is not of a nature to give a right to the appellant to restrain the entry of the husband in the house in question after all the house isa shared house of both the parties in which both have right of residence infunct one another to seek exclusive residence and restrain the other using the house in question. Appeal thus lacks merits is accordingly dismissed. Before parting, it is desirable that both the parties who are now late 50's and 60's of their life would be better advised to sit-together and sought out their differnece amicably.

10. Again it is important to extract certain finding of Appellate Court of Principal Sessions Judge, Srinagar given in Order dated 23.10.2021 in appeal U/S 29 of D.V.Act preferred against Order dated 11.03.2020. Para 14 of the

order of Hon'ble Appellate Court has been referred to by Ld Counsel for the respondent which is extracted as under:-

14. The appellant has thus dragged the matter since the year 2019 and is reported to have divested the respondent from his home, wherein she had prayed to be protected, particularly with regard to the shared accommodation. It appears that the appellant under the garb of her own grievance with regard to shared accommodation has dispossessed the respondent from his own house, even if, it may have been raised with the joint contribution of both of them as spouses.

6. First of all, it is important to observe that after the finding of Hon'ble Appellate Court in appeal decided on 24.02.2020 there is no scope left for this court to consider this point as to whether the application filed by the other-side which has been treated as objections, can still be considered as counter petition U/ 12 of D.V.Act against the wife. With respect to this point, paras 10 & 11 of the Order dated 24.02.2020 of Hon'ble court of Additional District Judge, Srinagar are relevant wherein finding on this point has been given.

7. As far as the main objection of the respondent is concerned that the instant application has been filed to frustrate the orders passed by Ld Special Court of PT&E dated 29.04.2019 and confirmed in appeal and other petitions, the respondent appears to have a valid reason to object. The Hon'ble court of Additional Sessions Judge, Srinagar in para 18 has observed that admittedly the house in question is jointly owned by both the parties though the parties are at variance as to how much they have contributed towards raising of the house. This finding along with observation of Hon'ble court of Principal Sessions Judge, Srinagar in para 14 of Order dated 23.10.2021 gives

sufficient reasons to respondent to object to withdrawal of the petition in which order has been passed in favour of the respondent. Though it is true that Order dated 29.04.2019 has been passed whereby both the parties have been directed to accommodate each other and the order stands confirmed in appeal and subsequent petitions as well but however, all these orders could be passed only when there was a petition preferred by AP in terms of Section 12 of D.V.Act. The question arises as to whether the AP who does not want to proceed with the petition U/S 12, can be forced to continue with the petition, the answer would certainly be in negative. Proceedings under D.V.Act are mainly civil in nature and domestic violence is a civil wrong but in order to expeditiously deal with the grievances of the APs a speedy mechanism has been provided under D.V.Act where a petition can be filed before a Magistrate by an aggrieved person or a protection officer or any other person on behalf of the AP and for this purpose, Code of Criminal Procedure has been made applicable by virtue of Section 28 of D.V.Act. However, Section 28 itself gives scope to the Magistrate to lay down its own procedure for disposal of application U/S 12 D.V.Act or sub-section 2 of Section 23 of D.V.Act. That would mean, a court of Judicial Magistrate can take the cognizance only when either AP or a protection officer or any other person on behalf of AP presents an application. Section 12 D.V.Act is unlike Section 190 of CrPC because U/S 190 of CrPC a Magistrate can take cognizance of any offence upon his own knowledge or suspicion apart from a private complaint or police report in writing made to such Magistrate. But as far as Section 12 of D.V.Act is concerned only after an application is made, a Magistrate can take cognizance of the wrong of 'domestic violence' and proceed to pass any order in accordance with procedure prescribed. Moreover, it is important to note that domestic violence *per se* is not an offence which cannot be compounded and so application seeking withdrawal

of petition under D.V.Act cannot be withdrawn. It is only violation of protection order passed under the provisions of D.V.Act, breach of which is an offence U/S 31 of D.V.Act. Therefore, this court feels that the applicant/AP cannot be debarred from withdrawing the petition by filing application to withdraw the same. However, it is significant to deliberate upon as to why the petition is withdrawn abruptly when the AP has been contesting since 26.02.2019. The AP has not only been contesting before the court of original jurisdiction but twice before Hon'ble Appellate Courts and then before Hon'ble High Court by virtue of petition U/S 482 CrPC. The AP further carried forward the proceedings to Division Bench of Hon'ble High Court by virtue of Letters Patent Appeal (LPA). The AP failed before all these courts and then ultimately the AP approached Hon'ble Apex Court of the country which is the only final supreme judicial authority in this country. But, however, special leave petition preferred by the aggrieved person has also been dismissed. It is admitted by both the sides the parties are now entangled in civil litigation and *status-quo* has been ordered to be maintained with respect to the suit property. In this backdrop once the AP could not get order dated 29.04.2019 modified or otherwise the instant application has been moved seeking withdrawal of the petition on the ground of “personal reasons”.

8. Even if, the reasons are not disclosed but the facts of the instant matter speak for themselves and clearly demonstrate that the AP wants to shake the foundation of these orders which have been passed since 29.04.2019 by the court of Ld PT&E as well as Hon'ble Appellate Courts, Hon'ble High Court of J&K And Ladakh and ultimately, by Hon'ble Supreme Court of India. The AP appears to have chosen a short-cut to withdraw from the proceedings to ensure that Order dated 29.04.2019 passed by the court is not implemented and the respondent, who was restrained from entering his own house

continues to be deprived of shared-household though it is admitted that both the parties have lived together as husband and wife for more than 30 years.

9. This case is one such glaring example of abuse of process of law whether the AP has protracted the proceedings up to the maximum capacity of its elasticity and a domestic violence petition which is, at the initial stage, has been dragged upto Hon'ble Supreme Court of India and the AP has ensured that the respondent remains deprived of the shared-household even if, the same is owned by the respondent. This court does not want to comment upon as to whether by depriving the respondent/husband who is the owner of the shared-household it would have tramautized the respondent or would have satisfied the grievances of the AP. The AP, as observed by Hon'ble Court of Principal Sessions Judge, Srinagar has divested the respondent from his own home and suddenly she has approached before this court with the application under consideration seeking withdrawal of the petition under Domestic Violence Act filed by her. Does it mean that the "Domestic Violence, has ceased to perpetuate or recurr and so, the AP wants to withdraw from the instant petition just to deprive the respondent from the benefits of the Order dated 29.04.2021. This is a case where the AP appears to have sought protection of her interest even if, at the cost of rights of the respondent and once she succeeded in firmly holding the house and approached civil court to protect her possession she might have thought it to withdraw from the proceedings under D.V.Act though, it is stated that the AP has removed the respondent under the garb of Order dated 23.03.2019 passed in D.V.Act petition whereby respondent was restrained from entering into the residential house of the applicant/petitioner. This court does not debar the AP from withdrawing the instant petition but however, the court has to be conscious of the fact that after putting the respondent to trial not only before this court but before Hon'ble Appellate Courts, Hon'ble High Court and

Hon'ble Supreme Court, the petitioner has withdrawn from the proceedings and therefore, the other-side has to be compensated for the pain and agony and inconvenience including cost of the litigations suffered by the other-side. Besides, it is imperative to restore the position of the shared-household as it existed on the date of institution of this case i.e, 29.02.2019.

10. It is quite obvious that the object of Protection of Women (from Domestic Violence) Act, is to give protection to women from violence which takes place when they live in such domestic relation. This is to protect legitimate and genuine cases where the aggrieved person does not indulge in acts which defeats the purpose and object of the legislation. Domestic Violence Act has not been enacted to cause harassment to the other spouse or to further aggravate the matrimonial discord to the extent of throwing the respondent out of his own house. This legislation cannot be allowed to be used in a manner that it spoils life of couples living peacefully. An act which is disproportionate to the level of protection can also be counter productive and instead of giving protection to the legitimate cases of domestic violence, it may have the potential to destroy marital institution. Therefore, it is important to sift and weigh cases to preserve the efficacy of Domestic Violence Act for legitimate and genuine cases.

11. In view of the above, this court allows the instant application seeking withdrawal of the instant petition U/S 12 of D.V.Act along with all other applications and the petition is dismissed as withdrawn. However, the petitioner/AP shall pay cost of Rs.10.00 Lacs (Ten Lacs only) to the respondent who has been deprived of shelter and accommodation from his own house under the garb of order obtained in the instant petition. Besides, both the parties are directed to restore the same position with respect to possession of the shared-household as existed on the date of the institution of

instant petition. In case, the AP fails to pay or does not pay the cost to the respondent within a period of one month from the date of this order the same shall be recovered in the manner prescribed for recovering land revenue. Accordingly, the instant application is disposed off. File be consigned to records after due completion.

**Announced:
16.12.2021**

**Fayaz Ahmad Qureshi (JK00169)
Judge Small Causes Court
Srinagar.**

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