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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.4037 OF 2021

Vithal Manik Khatri … Petitioner

V/s.

Sagar Sanjay Kamble @ Sakshi Vithal Khatri and Anr … Respondents

Mr. Sushant S. Prabhunne for the petitioner.

Mr. M.G. Patil, APP for the State.

Ms. Vrushali Mainded a/w Shaheen Kapadia, Shrusthi Tupe for respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : MARCH 16, 2023

P.C.:

1. The challenge in this petition is to the order dated 5th October 2021 passed by learned Additional Sessions Judge, Baramati, in Criminal Appeal No. 75 of 2019 confirming the Judgment and Order dated 11th November 2019 passed by Judicial Magistrate First Class, Baramati in Miscellaneous Application No.573 of 2018.

2. Respondent No.1, who initially was Transgender, filed a proceeding under the provisions of the Domestic Violence Act, 2005 as a woman under the Domestic Violence Act. According to the case of respondent No.1, she converted her gender from Transgender to female by performing surgery on 1st June 2016. On 21st July 2016, there was a marriage between the petitioner and

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respondent. Due to differences between the parties, the respondent filed Criminal Miscellaneous Application No.573 of 2018 under the provision of the Domestic Violence Act, 2005. In the said proceedings respondent filed an application seeking interim maintenance. The Judicial Magistrate First Class, Baramati, by order dated 11th November 2019, directed payment of Rs.12,000/- per month from the date of application. Aggrieved thereby, the petitioner filed an appeal before the learned Additional Sessions Judge, Baramati, by the impugned Judgment and Order, the said appeal has been dismissed. Aggrieved thereby, the petitioner has filed the present Writ Petition.

3. Learned advocate for the petitioner submitted that the respondent does not fall within the definition of aggrieved person as such right has been conferred on "women" in a domestic relationship. Additionally, it is submitted that there is no certificate issued to her under Section 7 of the Transgender Persons (Protection of Rights) Act, 2019, and therefore she cannot be treated as a woman under the provisions of the Domestic Violence Act, 2005. Finally, he submitted that in the absence of cogent evidence of the petitioners' income, the order of payment of Rs.12,000/- per month could not be justified.

4. Learned advocate for the respondent has filed a medical certificate of Doctor and in that certificate held as under:-

> This is to certify that Ms. Sakshi Vitthal Khatri, Age-24 yrs, female has been appears for vaginoplasty (Net vagiana creation by penile in versien technique with penile amptutation) urethroplasty & Bilateral orchidetomy in sicinovate layer & Cosmetic surgery center.

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5. *Per contra,* the learned advocate for the respondent relying on the judgment of Apex Court in the Case of **National Legal Services Authority Vs. Union of India and others,** in Writ Petition (Civil) No.400 of 2012 dated 15th April 2014, submitted that the Apex Court, by the said judgment, recognized the right of transgender persons to decide self-identified Transgender. Inviting the attention of this Court in paragraph 105 of the said judgment, it is submitted that the Apex Court has recognized the right of a person who has changed his/her sex in tune with his/her gender characteristics and perception can be granted due recognition to the gender identity based on the reassigned sex after under undergoing SRS. She also submitted that the petitioner's income exceeds Rs. 25,000/- per day; therefore, the direction to pay Rs.12,000/- is legal and proper.

6. Rival contentions call for consideration.

7. The issue involved is as to whether a transgender person who converts himself into a woman by performing surgery can be termed as an aggrieved person within the meaning of Section 2(a) of the Domestic Violence Act, 2005. To decide the question, relevant provisions of the statute need to be noted which are as under:-

> 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

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consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

2.(g) "domestic violence" has the same meaning as assigned to it in section 3;

23. Power to grant interim and *ex* parte orders. —(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an *exparte* order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section against the respondent.

Section 2(*k*) of Transgender Persons (Protection of Rights) Act, 2019.

Section 2(*k*) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner, hijra, aravani* and *jogta.*

Section 7 of Transgender Persons (Protection of Rights) Act, 2019.

7. **Change to gender**—(*1*) After the issue of a certificate under sub-section (*1*) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form

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and manner as may be prescribed.

(2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

(3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person.

Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act.

8. Section 2(a) of the Domestic Violence Act, 2005 refers to a woman who has or has been in a domestic relationship with the respondent. Section 2(f) of the Act is gender neutral, which includes persons irrespective of their sexual preferences. Section 2(g) assigns the meaning of Domestic Violence to the provision under Section 3 of the Act. Section 23 of the Domestic Violence Act, 2005 confers a right of aggrieved persons to claim maintenance. Section 2(k) of Transgender Persons (Protection of Rights) Act, 2019 defines transgender persons. Irrespective of whether such persons have undergone sex/reassignment surgery, including persons with intersex variations and other persons mentioned in the definition, Section 7 enables a person who has performed surgery to change gender to file an application with the District Magistrate for change of such gender.

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9. To consider the status of the respondent as an 'aggrieved person' under Section 2(a) of the Domestic Violence Act, 2005, it is necessary to understand word 'woman' occurring in the said provision. The word 'woman' controls the amplitude of section 2(a). The question as to whether a person who has undergone a gender change operation can be termed as a 'woman' is no longer *res-integra* in view of the authoritative pronouncement of the Apex Court in the Case of **National Legal Services Authorities** (supra), wherein the apex Court in paragraph **105** held as under:-

> 105. If person has changed his/her sex in tune with his/her gender characteristics and perception which has become possible because of the advancement in medical science, and when that is permitted by in medical ethics with no legal embargo, we do not find any impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassign sex after undergoing SRS.

10. While concluding the judgment, the Apex Court in paragraph 129 clause 2 held as under :-

> 129. We, therefore, declare:
>
> ……..
>
> (2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
>
> …….

11. On perusal of paragraphs 105 and 129, there is no manner of doubt that transgender persons or either a male or female who has performed a sex change operation are entitled to gender to their choice. The object and purpose of the provisions of the

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Domestic Violence Act 2005 is to provide more effective protection of the right of the women guaranteed who is victims of violence of any kind that occurs within the family. Domestic violence has been recognized human rights issue and a serious deterrent to development - The Vienna Accord of 1994, the Beijing Declaration, and the Platform for Action (1995). The need to pass legislation like the protection of women from domestic violence Act was found necessary as the existing civil law was inadequate to address a woman who was and is subjected to cruelty by their husband and their family relatives in recognition of their fundamental rights guaranteed under Article 14, 15 and 21 of the Constitution of India. Therefore, while interpreting the definition of aggrieved persons in tune with the object and purpose of the Act, such definition needs to be interpreted with the broadest possible terms. The word 'woman' in section 2(a) is no more limited to the binary of women and men and includes the transgender person also who has changed her sex in tune with her gender characteristics. Therefore, in my opinion, the Transgender who has performed surgery to change gender to a female, needs to be termed as an aggrieved person within the meaning of Section 2(a) of the Domestic Violence Act, 2005. It is, therefore, held that a person who has exercised his right to decide the self-identified gender of women is an aggrieved person within the meaning of Section 2(a) of the Domestic Violence Act, 2005.

12. Regarding the amount quantum of maintenance, the respondent has stated on oath that the petitioner has Sweet Shops and Snacks Centre, and he is getting income of Rs. 25,000/- to

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Rs.30,000/- per day. They also have immovable properties in Baramati. Based on such statements and material on record, the courts below exercised their discretion to grant an amount of Rs.12,000/- per month, which in my opinion, is not unreasonable.

13. The petitioner shall clear arrears of maintenance within a period of Four weeks from today.

14. For these reasons, there is no miscarriage of justice. The writ petition is, therefore, stands dismissed. No costs.

(AMIT BORKAR, J.)

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