

**Nagesh Malik Vs Payal Malik**

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**Court :** Delhi

**Decided On :** Jul-29-2010

**Judge :** Mr. Shiv Narayan Dhingra, J.

**Acts :** [Protection of Women from Domestic Violence Act, 2005](#) -  
Sections 12, 18, 19, 20, 22, 23, ; Sections 3, 4, 125, Code of Criminal Procedure (CrPC)  
(Cr.Pc)

**Appeal No. :** Crl. Rev. P. No. 253/2010 ; 252/2010 ; 338/2010

**Appellant :** Nagesh Malik

**Respondent :** Payal Malik

**Advocate for Def. :** Mr. R.Jain, Mr. Deepak Aggarwal , Mr. D.Jain, Advs.

**Advocate for Pet/Ap. :** Mr. Dharam Raj, Adv.

**Judgement :**

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

1. These petitions arise out of order passed by the learned Additional Sessions Judge on 7th May, 2010 while disposing of two appeals against the order dated 27th July, 2009 passed by the learned MM.

2. The undisputed facts are that Ms. Payal Malik used to live with her parents before marriage at Hissar. Her marriage took place with Mr. Nagesh Malik whose parents used to live at Panipat. Marriage of the parties was solemnized at Panipat on 30th August, 2001. Nagesh Malik was already working in USA and after marriage both of them went to USA on 20th September, 2001 where they settled their matrimonial home and lived together. On 24th October, 2002 a female child was born to the couple at USA, who was named as Vanishka. The parties continued living together in USA till 2008. It seems deep differences arose between the parties and they could not pull on together. There are allegations and counter allegations made by wife and husband which are not relevant for the purpose of deciding this petition. However, husband alleged that on 6th August, 2008 due to these differences, parties executed a post-nuptial agreement and decided to obtain divorce from each other, sticking to the agreement. Wife refutes having signed the agreement voluntarily and alleges that she was turned out from USA by her husband on 22nd August, 2008. Whereas the husband's contention is that she of her own left USA without joining the husband for obtaining divorce through a Court in USA. The husband filed a divorce petition before Superior Court of New Jersey Chancery Division Family Court USA on 27th August, 2008. The notice of divorce suit was duly served on her. The Court of New Jersey allowed the divorce petition and a decree of divorce was granted on 4th December, 2008.

3. On 13th January, 2009 wife filed a complaint before CAW Cell Hissar against husband and in-laws. Ms. Sushila, Inspector of CAW Cell Hissar, vide her report dated 20th January, 2009, observed that the allegations in the complaint were not true and it was useless to keep the complaint pending further. Thereafter, wife filed a complaint in the Court of MM at Delhi making her husband (Nagesh Malik), father-in-law (Harbans Lal Malik), mother-in-law (Neelam Malik) and brother-in-law (Varun Malik) as parties under Section 12 of [Protection of Women from Domestic Violence Act, 2005](#) [in short Domestic Violence Act] with a prayer that Court should pass a protection order under Section 18, residence order under Section 19, monetary relief order under Section 20, compensation order under Section 22 and interim orders under Section 23 of the Act. She made allegations of mal-treatment at the hands of respondents from day one of the marriage till she left USA and came to India. She stated, after coming back from USA she went to her

in-laws house at Panipat but found the house locked as her parents-in-law had gone to USA. She also stated that her husband had sent a complaint to SP Panipat leveling certain scandalous allegations against her. She graduated from Delhi University in 1998 and had done interior designing course from South Delhi Polytechnic. She alleged that her in-laws had three houses and an industrial unit in Panipat. They had properties in Delhi as well and respondent no.1 (her husband) had share in properties of her in- laws. She submitted that her complaint at CAW Cell Hissar could not be pursued by her as her in-laws had tried to mislead Haryana police and also because of a tragedy in her family. She left her parents house and came to Delhi to pursue her career prospects. She was presently residing at Malviya Nagar, Delhi. Till the time she was not given back her matrimonial home (at Panipat), she would live in Delhi, so the Court of MM at Delhi had jurisdiction. She prayed that custody of child Vanshika should be given to her. She should be given shares in properties at Panipat and Delhi as well as a house in New Jersey, USA. She should be given Rs.20,000/- per month for her maintenance and education as she intended to pursue further study and Court should direct for return of her dowry articles. Along with main application under the Domestic Violence Act, applications for interim reliefs were made. She in the application under Section 23 of the Act prayed for a residence or in lieu thereof a sum of Rs.20,000/- per month and Rs.50,000/- as onetime payment to meet education expenses, a car or Rs.8,000/- per month in lieu of the car and Rs.20,000/- per month for her day-to-day expenses and Rs.50,000/- as onetime payment to repay her debts.

4. The learned MM, by her order dated 27th July, 2009 directed that an amount of Rs.50,000/- per month be paid to wife as interim maintenance jointly or severally by respondents no. 1,2 & 4. She dropped respondent no.3 from the array of respondents on the ground that petition against a female respondent was not maintainable.

5. It was pleaded before the learned MM by the petitioner that there was a decree of divorce granted by a Competent Court of New Jersey, Chancery Division after following due procedure as laid down in USA. After grant of divorce there was no domestic relationship of Ms. Payal Malik with any of the respondents. (It is noted in

the order of MM that the decree of divorce passed by the Court of US was placed on record.) Reliance was also placed by the petitioner on post nuptial agreement as entered into between husband and wife. The learned trial Court did not think it proper to deal with the issue whether an application under Section 12 of Domestic Violence Act could be entertained at all in respect of a divorced wife and whether the decree of divorce granted by the foreign Court where the parties had lived together for more than seven years, had some value or not.

6. The trial Court after discussing the objects and aims of The Protection of Women Against Domestic Violence Act, 2005 and after reproducing a quote from novelist Joseph Conrad "being a woman is a terribly difficult task, since it consists principally in dealing with men" [as if men, though given birth by women, are ferocious animals and not human beings, but cannibals] passed an order for grant of maintenance.

7. In appeal before the learned Sessions Judge, an argument was pressed that the judgment given by New Jersey Court was conclusive evidence of status of the parties and in view of Section 14 of Code of Civil Procedure and Section 4 of The Indian Evidence Act, unless the judgment was set aside the trial Court should not have entertained the petition under Section 12 of The Protection of Women Against Domestic Violence Act. It was pleaded that only an application under Section 125 Cr.P.C. (which is applicable to divorced wife) could have been entertained by a Court, if moved. It was argued by wife that decree of divorce was obtained by fraud and was hit by Section 13 CPC and therefore could not stand in the way of entertaining an application under Section 12 of Domestic Violence Act.

8. The learned Sessions Judge while deciding appeal observed that the provisions of Domestic Violence Act are to be interpreted taking help of Section 125 Cr.P.C. and the explanation given under Section 125 Cr.P.C. of "Wife" is to be read in Domestic Violence Act also. He further observed that the Court has to take pragmatic approach and unless the dissolution of marriage was proved by evidence, the Court has not to act on the decree. He therefore dismissed the appeal filed by husband and other respondents observing that there was no illegality in the order of learned trial Court in granting maintenance. He allowed an

appeal filed by wife in respect of execution of the order of of MM and directed that Ministry of External Affairs be sent a request to execute the order dated 27th July, 2009 as per law.

9. The first issue arising in this case is whether an application under Section 12 of Domestic Violence Act made by the respondent could have been entertained against all the respondents (petitioners herein) as arrayed in her application and whether the Court without discussing the domestic and legal relationship of different respondents with the petitioner, could have passed an order against the petitioners making them jointly and severally liable to pay maintenance of Rs.50,000/-.

10. Under Section 12, an aggrieved person can file an application to Magistrate against the respondents. The respondent has been defined under Section 2 (q). The definition reads as under: "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

11. It is apparent that in order to make a person as respondent in a petition under Section 12, there must exist a domestic relationship between the respondent and the aggrieved person. If there is no domestic relationship between the aggrieved person and the respondent, the Court of MM cannot pass an order against such a person under the Act. Domestic relationship is defined under Section 2 (f) of the Act and is as under: "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 a relationship in the nature of marriage, adoption or are family members living together as a joint family;

12. It is apparent that domestic relationship arises between the two persons, who have lived together in a shared household and when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. The definition

speaks of living together at any point of time however it does not speak of having relation at any point of time. Thus, if the domestic relationship continued and if the parties have lived together at any point of time in a shared household, the person can be a respondent but if the relationship does not continue and the relationship had been in the past and is not in the present, a person cannot be made respondent on the ground of a past relationship. The domestic relationship between the aggrieved person and the respondent must be present and alive at the time when complaint under Domestic Violence Act is filed and if this relationship is not alive on the date when complaint is filed, the domestic relationship cannot be said to be there. The first respondent made by the wife in her complaint before the learned MM in this case was husband with whom the wife had lived under the same roof in a shared household till 22nd August, 2008 in USA. She had not lived for last 7 1/2 years with respondent no.1 in India. Respondent No.4 is Varun Malik who is brother of the husband. Under no circumstances it can be said that brother of husband, who was a major and independent, living separately from this husband and wife, had any kind of domestic relationship or moral or legal responsibility/obligations towards his brothers wife. He had not lived in domestic relationship with Payal Malik at any point of time. Merely because a person is brother of the husband he cannot be arrayed as a respondent, nor does an MM gets authority over each and every relative of the husband, without going into the fact whether a domestic relationship or shared household was there between the aggrieved person and the respondent.

13. The other respondent made in this case is Harbans Lal, father of Nagesh Malik. Nagesh Malik was living in USA he came to India to solemnize his marriage with an appropriate person. After marriage was solemnized he left India and went to USA. He lived all along with his wife in USA, birth of the child had taken place in USA. In all such cases where boy lives abroad and is settled abroad but comes to India for marriage, it is known to the girl as well as to the parents of the girl that they are choosing a groom who is not living with his parents but settled abroad. His links with the parents are only as with any other relative. He is not dependent on parents may be parents, if poor, take financial help from him.

14. The girl and the parents of the girl knew it very well that they had selected a person for marriage with whom the girl was going to live abroad and the matrimonial home and the shared household was going to be outside India. This act of marrying a person settled abroad is a voluntary act of the girl. If she had not intended to enjoy the fat salary which boys working abroad get and the material facilities available abroad, she could have refused to marry him and settled for a boy having moderate salary within India. After having chosen a person living abroad, putting the responsibility, after failure of marriage, on the shoulders on his parents and making them criminals in the eyes of law because matrimonial ties between the two could not last for long, does not sound either legally correct or morally correct. How can the parents of a boy who is working abroad, living abroad, an adult, free to take his own decisions, be arrayed as criminals or respondents if the marriage between him and his wife failed due to any reason whatsoever after few years of marriage. If the sin committed by such parents of boy is that they facilitated the marriage, then this sin is equally committed by parents of the girl. If such marriage fails then parents of both bride and groom would have to share equal responsibility. The responsibility of parents of the groom cannot be more. Shelter of Indian culture and joint family cannot be taken to book only relatives of boy. A woman's shared household in India in such cases is also her parents house where she lived before marriage and not her in-laws house where she did not live after marriage.

15. When the shared household of husband and wife had not been in India for the last 08 years at any point of time, it is strange that the learned MM did not even think it proper to discuss as to how the father or the brother of the boy could be made respondents in proceedings of domestic violence, after husband and wife had not been able to pull on together. In the present case, Mr. Harbans Lal Malik petitioner could not be said to have shared household with the respondent since the respondent had not lived in his house as a family member, in a joint family of which Harbans Lal Malik was the head.

16. It is important to consider as to what "family" is and what "joint family" is. As per Blacks Law Dictionary (VI Edition) "family" means a collective body of persons who live in one house under one head or management. Dictionary states that the

meaning of word "family" necessarily depends on field of law in which word is used, but this is the most common meaning. "Family" also means a group of blood relatives and all the relations who descend from a common ancestor or who spring from a common root. However, for the purpose of domestic violence act where the object is to protect a woman from domestic violence, "family" has to be defined as a collective body of persons who live in one house under one head or management. In Chambers Dictionary (1994-95) again the "family" is defined as all those who live in one house i.e. parents, children servants; parents and their children. In Shorter Oxford English Dictionary (1993 ed.) "family" is defined as a group of persons living in one household including parents and their children, boarders, servants and such a group is a organizational unit of society.

17. A Hindu Joint Family or Hindu Undivided Family (HUF) or a Joint Family is an extended family arrangement prevalent among Hindus of the Indian subcontinent, consisting of many generations living under the same roof. All the male members are blood relatives and all the women are either mothers, wives, unmarried daughters or widowed relatives, all bound by the common sapinda relationship. The joint family status being the result of birth, possession of joint cord that knits the members of the family together is not property but the relationship. The family is headed by a patriarch, usually the oldest male, who makes decisions on economic and social matters on behalf of the entire family. The patriarchs wife generally exerts control over the kitchen, child rearing and minor religious practices. All money goes to the common pool and all property is held jointly. The essential features of a joint family are: Head of the family takes all decisions All members live under one roof Share the same kitchen Three generations living together (though often two or more brothers live together or father and son live together or all the descendants of male live together) Income and expenditure in a common pool - property held together. A common place of worship All decisions are made by the male head of the family patrilineal, patriarchal.

18. Thus, in order to constitute a family and domestic relationship it is necessary that the persons who constitute domestic relationship must be living together in the same house under one head. If they are living separate then they are not a family but they are relatives related by blood or consanguinity to each other. Where

parents live separate from their son like any other relative, the family of son cannot include his parents. The parents can be included in the family of son only when they are dependent upon the son and/or are living along with the son in the same house. But when they are not dependent upon the son and they are living separate, the parents shall constitute a separate family and son, his wife and children shall constitute a separate family. There can be no domestic relationship of the wife of son with the parents when the parents are not living along with the son and there can be no domestic relationship of a wife with the parents of her husband when son along with the wife is living abroad, maintaining a family there and children are born abroad. I, therefore consider that Harbans Lal Malik could not have been made as a respondent in a petition under Domestic Violence Act as he had no domestic relationship with aggrieved person even if this marriage between her and her husband was subsisting.

19. I, also consider that the definition of "wife" as available under Section 125 Cr.P.C could not be imported into Domestic Violence Act. The Legislature was well aware of Section 125 Cr.P.C. and if Legislature intended, it would have defined "wife" as in Section 125 Cr.P.C in Domestic Violence Act as well. The purpose and object of Domestic Violence and provision under Section 125 Cr.P.C. is different. While Domestic Violence Act has been enacted by the Parliament to prevent acts of domestic violence on women living in a shared household. Section 125 of Cr.P.C. is to prevent vagrancy where wife is left high and dry without maintenance. Law gives a right to claim maintenance under Civil Law as well as Section 125 Cr.P.C. even to a divorced wife, but an act of domestic violence cannot be committed on a divorced wife, who is not living with her husband or family and is free to live wherever she wants. She has a right to claim maintenance and enforce other rights as per law. She has a right to claim custody of children as per law but denial of these rights do not amount to domestic violence. Domestic Violence is not perceived in this manner. The definition of "Domestic Violence" as given in Section 3 of The [Protection of Women from Domestic Violence Act, 2005](#) and is under:

3. **D e f i n i t i o n o f d o m e s t i c v i o l e n c e .-** For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute

domestic violence in case it -

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.-For the purposes of this section,-

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and

her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the

aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

20. This definition pre supposes that the woman is living with the person who committed violence and domestic relationship is not dead buried or severed. This does not speak of past violence which a woman suffered before grant of divorce.

21. The next question which arises is whether the learned Court of MM could have ignored the decree granted by the Court of New Jersey, USA. Section 14 of CPC reads as under:

14. Presumption as to foreign judgments. The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

22. It is evident from the reading of this provision that the Court has to presume, if a certified copy of foreign judgment is produced that such judgment was pronounced by a Court of competent jurisdiction unless the contrary appears on record or is proved. Obtaining of divorce by husband from New Jersey Court is not denied in this case. Prima facie New Jersey, USA Court had jurisdiction is evident from the fact that husband and wife lived together in New Jersey for 7 1/2 years. The laws of New Jersey provided that the jurisdiction in a matrimonial matter can

be assumed by the Court if the parties have ordinarily lived there for one year. In the present case admittedly the parties lived there for 7 1/2 years thus prima facie there was no issue whether the Court of New Jersey had jurisdiction or not.

23. Section 13 of CPC provides as under:

13. When foreign judgment not conclusive.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of 1[India] in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in 1[India].

24. It is evident that a foreign judgment has to be on the face of it considered to be final. The explanations as mentioned in Section 13 are to be proved by a person who alleges that the foreign judgment was not to be relied on and should not be considered. A foreign judgment can be set aside by a competent Court, only when the person aggrieved from foreign judgment asks for a declaration that the judgment should not be acted upon. So long as the foreign judgment is not set aside and the issue regarding foreign judgment is not adjudicated by a competent Court, the judgment cannot be ignored and a Court cannot brush aside a foreign judgment as a non- consequential. Section 13 & 14 of CPC provide how a foreign judgment is to be dealt with. A Court in India has to presume that the judgment

delivered by a foreign Court where the parties had lived for 7 1/2 years and given birth to a girl, is a judgment given by a competent court and if anyone wants that this judgment be disregarded, he has to prove the same before the Court. So long as he does not prove it, the judgment is considered as a valid judgment and has to be given effect to.

25. It was argued by the respondent Counsel that the respondent did not participate in proceedings before the Court of New Jersey, USA. Participating or not participating before the Court is not a ground for setting aside its judgment. The grounds for setting aside a foreign judgment are given in Section 13 CPC and this is not one of the grounds.

26. The question of jurisdiction was considered by the Court of New Jersey, USA that awarded decree of divorce and it is not shown by the Counsel for respondent how Court of New Jersey had no jurisdiction when the two parties lived there for 7 1/2 years and gave birth to a US citizen within the jurisdiction of that Court. Learned Counsel for the respondent relied upon *Y. Narasimha Rao v. Venkata Lakshmi* (1991) 3 SCC 451 to press the point that a decree of divorce granted by a foreign Court should not be relied upon since the parties were married in India and they were governed by Hindu Marriage Act. A bare perusal of the judgment of New Jersey Court would show that the divorce was granted on the ground of cruelty which is one of the grounds available under Hindu Marriage Act.

27. In *Y. Narasimha Raos* case (supra), decree of divorce was obtained by husband from the Circuit Court of St. Louis Country Missouri, USA by creating a jurisdiction of that Court as the condition for invoking jurisdiction of that Court was 90 days residence. Supreme Court observed that the residence does not mean a "temporary residence" for the purpose of obtaining divorce but it must be "habitual residence" which is intended to be a permanent residence for future as well, since it was not the case, the decree was found to be null and void. It is not the position in this case. The parties had made New Jersey as their home for 7 1/2 years thus the Court of New Jersey could not be said to have assumed jurisdiction only on the basis of temporary residence of husband. I also consider that issue of assuming jurisdiction on the basis of temporary residence may have no force

today when statutory provisions in India allow assumption of jurisdiction on the basis of a temporary residence [Section 27(1)(a) of [Protection of Women from Domestic Violence Act, 2005](#)].

28. I am surprised that the Courts below did not give weight to the judgment of New Jersey where parties lived for 7 1/2 years but assumed jurisdiction under Domestic Violence Act because of the pure temporary residence (as pleaded by her) of wife in Delhi who is otherwise resident of Hissar. The Court of ASJ wanted that the order of the Court of MM should be honoured by the US while the Court here would not honour a decree of Court of USA where the husband and wife lived for 7 1/2 years.

29. I consider that the decree of divorce granted by the Court of New Jersey, USA where husband and wife lived together for 7 1/2 years and gave birth to a child could not be ignored and it could not be said that domestic relationship of the wife continued with her husband in New Jersey or her in-laws living at Panipat.

30. The learned MM and learned ASJ committed jurisdictional error by assuming jurisdiction under Domestic Violence Act, in view of admitted fact that the wife had all along, before filing the petition under Domestic Violence Act, lived with her husband in USA. Her shared household had been in USA, her husband was still living in USA the child was born in USA. The courts below also committed grave error by making brother or father of the husband and father of the husband jointly responsible for payment of Rs.50,000/- to the wife. There was no justification for directing brother of the husband to pay this amount. Once a son grows and he starts earning, marries, makes his separate home, and sires children the burden of his wife cannot be put on the shoulders of his father or brother on an estrangement between husband and wife. This burden has to be borne by the husband alone and not by the parents or brothers or sister of the husband, unless and until the husband had been contributing to the joint family as a member of HUF and has a right of deriving benefits from the joint family. If the husband had not been contributing or deriving benefits from the joint family, had not been member of the joint family and the parents had been treated like any other relative, how can the parents be burdened with the responsibility of his wife.

31. In view of my above discussion, order dated 27th July, 2009 passed by learned MM and order dated 7th May, 2010 passed by learned ASJ, directing payment of Rs.50,000/- jointly and severally, ignoring the decree of divorce and without devolving upon the domestic relationship are illegal and not tenable. The orders are set aside. No order as to costs.

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