(2009) 09 MAD CK 0138

Madras High Court

Case No: Criminal R.C. No. 363 of 2009

Alexander Sambath Abner		APPELLANT
	Vs	
Miron Lada, Jenitha and Abner Sebastian Oscar, represented by their mother Miron Lada		RESPONDENT

Date of Decision: Sept. 14, 2009

Acts Referred:

- Protection of Women From Domestic Violence Act, 2005 - Section 12, 18, 19(1), 22(3), 23

Citation: (2010) 2 Crimes 864 : (2010) 1 LW(Cri) 93 : (2011) 6 RCR(Criminal) 1547

Hon'ble Judges: T. Suganthiram, J

Bench: Single Bench

Advocate: A.N. Rajan, for the Appellant; R. Subramaniam and R. Amizhdhu, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

T. Suganthiram, J.
The revision Petitioner herein is the husband of the first Respondent herein and father of the second and third Respondent. The first Respondent herein filed an application before the learned Judicial Magistrate II, Puducherry, u/s 12 of the Protection of Women from Domestic Violence Act, 2005, seeking relief u/s 18 of the said Act. She also filed an interim application in Crl.M.P. No. 1700 of 2007 u/s 23(2) of the said Act. In the said petition, the reliefs sought for by the first Respondent are as follows:

a. restraining the Respondent and his men from committing any act of domestic violence.

b. restraining the Respondent and his men from dispossessing or in any other manner disturbing the possession and enjoyment of the house by the complainants, where they are living at No. 22, First Cross Street, Ezhil Nagar(North), Puducherry-8.

c. directing the Respondent to remove himself from the house of the complainant.

d. restraining the Respondent and his men from alienating or disposing off the house of the complainant in any manner.

2. After notice being given to the Petitioner herein as he had not filed any counter, the learned Magistrate after recording that no counter was filed, allowed the petition on 11.12.2007 in Crl.M.P. No. 1700 of 2007 and granted interim relief as prayed for. Then on the very same day, the Petitioner herein filed an application in Crl.M.P. No. 543 of 2008 u/s 25(2) r/w 23(2) of the said Act, seeking for the revocation of the order already passed. The Respondent herein also filed counter in that application and the learned Magistrate after hearing both parties, passed an order on 23.09.2008, modifying the earlier order permitting the Petitioner herein to reside in the shared household without committing any act of violence against the Respondent herein. The other interim relief order granted under Clause-a, b and d in Crl.M.P. No. 1700 of 2007 were made to remain as it is.

3. The Respondents herein aggrieved by the modification order of the learned Judicial Magistrate, preferred an appeal before the Sessions Judge, Puducherry u/s 29 of the said Act in Crl.A. No. 24 of 2008. The learned Sessions Judge, allowed the appeal filed by the Respondents herein, observing that no appeal has been filed u/s 29 of the Act by the Petitioner herein and it has to be taken that he had not challenged the interim order passed by the learned Judicial Magistrate u/s 22(3) of the Act and the learned Magistrate had no power to modify his own order by exercising his power u/s 25 of the Act, since there was no change in the circumstances. Aggrieved by the order of the learned Principal Special Judge, Puducherry, the Petitioner herein has preferred this revision petition before this Court.

4. The learned Counsel for the Petitioner submitted that originally interim order passed by the learned Magistrate on 11.12.2007 was only an ex parte order and the learned Magistrate had ample power to alter, modify or revoke the earlier order u/s 25(2) of the said Act. Though no counter was filed by the Petitioner herein on that day, without hearing the Petitioner herein, a stringent order has been passed by the learned Magistrate to remove him from the shared household and that order require a reconsideration and therefore after hearing the Petitioner herein, the learned Magistrate only modified the order. The learned Counsel for the Petitioner herein further submitted that the main petition is pending and while so, without hearing the Petitioner, the interim order has been passed causing great hardship to him and he had been particularly thrown out of the household and even that order being set right by the learned Judicial Magistrate himself, the learned Sessions Judge had erroneously allowed the appeal against the principles of natural justice.

5. The learned Counsel for the Petitioner reiterated that the application filed u/s 25(2) of the said Act is maintainable and there was no need for the Petitioner herein to prefer an appeal against the ex parte order passed by the learned Magistrate in Crl.M.P. No. 1700 of 2007.

6. The learned Counsel appearing for the Respondent submitted that once an order is passed by the learned Magistrate, it cannot be set aside or modified by the same Court by invoking Section 25(2) of the said Act, unless the Court is satisfied with the circumstances in the case requiring such alteration, modification or revocation order passed earlier. If person feels aggrieved by the order, the only remedy available is u/s 29 of the Act to file an appeal within 30 days from the date of receipt of that order.

7. Mr. R. Subramanian, learned Senior Counsel further submitted that even the learned Magistrate while modifying the order passed, has not pointed out any change of circumstance and the order passed by the learned Magistrate cannot be construed as an exparte order, since the Petitioner herein has not chosen to file any counter or objection petition.

8. The learned Senior Counsel also further submitted that the Sessions Judge had rightly held that the Petitioner herein instead of invoking Section 29 of the Act had wrongly invoked Section 25(2) of the Act.

9. The learned Counsel for the Petitioner herein submitted that there are ample materials available with the Petitioner to show that though the properties stands in the name of his wife, the plot was purchased and the house was constructed only by the Petitioner herein and it is an admitted fact that both the husband and wife were living together in the same house and if the Petitioner is sent out of the house, a grave injustice will be caused to him.

10. The learned Senior Counsel for the Respondent herein submitted that no injustice is caused to the Petitioner herein and the Protection of Women from Domestic Violence Act is the beneficiary Act for the affected women and special protection is given to the women and the first Respondent herein being harassed and ill-treated by the Petitioner herein, she had chosen to file the application before the learned Magistrate. The learned Senior Counsel also relied upon the Order of this Honourable High Court in W.P. No. 28521 of 2008 dated 03.04.2009, wherein the Court declined to hold that Section 12, 18, 19 and 23 of the Protection of Women from Domestic Violence Act, 2005, are unconstitutional, ultra virus and void.

11. The learned Senior Counsel also relied on the decision of this Court reported in 2008(1) MLJ 1315 Amar Kumar Mahadevan v. Karthiyayin, wherein it is observed as follows:

8. In construing the provisions of the Act, the Court has to bear in mind that it is a beneficent piece of social welfare legislation aimed at promoting and securing the

well-being of the aggrieved persons and the Court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act. It must be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim.

12. This Court considered the submission made by both sides and perused the records. The Respondent herein filed an application u/s 12 of the Protection of Women from Domestic Violence Act, 2005 before the Judicial Magistrate II, Puducherry in the month of April, 2007. Along with the said application, a petition for interim order was filed u/s 23 (2) of the said Act. Though notice was also issued to the Petitioner herein and he had appeared before the learned Magistrate, he has not filed any counter and therefore, the learned Magistrate allowed the said application filed by the Respondent u/s 23(2) of the Act on 11.10.2007. By the said interim order, one of the relief granted to the Respondent herein directing the Petitioner herein to remove himself from the house of the Respondent herein. Of course, u/s 19 of the said Act, while disposing of an application under Sub-section (1) of Section 12, the Magistrate may pass such a residence order. The Magistrate also has power u/s 23 of the Act to pass such an interim order. It is an admitted fact that both the husband and wife had earlier occupied the residence. According to the Respondent herein, she is the owner of the house, but according to the Petitioner herein, only he had spent money for the purchase of plot and constructing the house and originally the plot was purchased in the name of his mother-in-law and on the very same day, it was transferred to the first Respondent herein. According to the Petitioner herein, the order was passed by the learned Magistrate u/s 23(2) of the said Act in favour of the Respondent herein without hearing the Petitioner, and therefore, it amounts to an ex parte order. Immediately the application was also filed by the Respondent herein u/s 23(2) of the Act and the learned Magistrate also subsequently modified the earlier order. According to the learned Magistrate, the application filed u/s 25(2) of the said Act is maintainable and there was no need for the husband/Petitioner herein to file an appeal against that ex parte order.

13. The learned Magistrate has observed in his order as follows:

18. As per the above provisions of law, this Court has ample power to alter, modify or revoke the earlier order, if this Court has satisfied that there is a change in the circumstances for reasons to be required in writing, on application made by the affected party or the Respondent. In the present case in hand, the affected party namely the Respondent/husband filed this application in Cr.M.P. No. 543/08 u/s 25(2) of the Protection of Women from Domestic Violence Act, 2005 to revoke the earlier order. As already discussed without hearing the Respondent or without contesting the allegations of the petition an interim order was granted by this Court to remove the Respondent from the shared household. The allegation regarding the violence committed by the Respondent and the counter allegations made by the Respondent/husband are matter to be decided after the trial in the main application. In the interim application, it is sufficient

to see prima facie materials available to decide this case. Since a stringent order is passed against the Respondent i.e., to remove the Respondent from the shared household in the interim order in Cr.M.P. No. 1700 of 2007, without hearing the Respondent, it requires reconsideration.

14. In the appeal preferred by the Respondent herein before the Sessions Court, the learned Sessions Judge held that the Petitioner herein should have filed only an appeal against the order passed by the learned Magistrate u/s 23(2) of the said Act and further held that as the Petitioner herein has not chosen to file the appeal, it should be taken that he had not challenged the order of the learned Magistrate passed u/s 23(2) of the Act.

15. The learned Sessions Judge has further held that

the Magistrate can also alter, modify or revoke his earlier interim order passed u/s 23 of me Act exercising power u/s 25 of the Act, but it may appear similar power has been given to the learned Magistrate as well as appellate court u/s 25 and 29 of the Act respectively. The appellate Court being a Sessions Judge is superior than the Magistrate Court and hence the object of the Legislature could not be that similar power can be exercised by the Magistrate and the Appellate Court u/s 25 and 29 of the Act respectively. The powers that could be exercised u/s 25 and 29 of the Act operate in different fields and while that could be exercised u/s 25 and 29 of the Act operate in different fields and while the Magistrate can exercise his power u/s 25(2) of me Act only if there is a change in the circumstances, the Appellate Court can exercise its power u/s 29 of the Act to alter, modify or revoke the order of the Magistrate considering the merits of the order including the change in the circumstance. The Magistrate can alter, modify or revoke the earlier order as a matter of right considering me merits of me earlier order or by reviewing its earlier order. But it can exercise its power only in the change of circumstance. The learned Sessions Judge further held that the Magistrate has travelled beyond his power u/s 25 of the Act, and in fact, there is no change in the circumstance for varying or revoking the interim order passed u/s 23 of the said Act.

16. From the observations of the learned Magistrate and the learned Sessions Judge, the points which arise for determination are as follows:

i) Whether the interim order passed by the learned Magistrate without hearing the other side could be considered as ex parte order.

ii) If so, whether the affected party should file only an appeal u/s 29 of the Act or may invoke the provision u/s 25 of the said Act.

iii) While invoking the provision u/s 25 of the Act, whether by merely giving an opportunity to the affected party to be heard could it be considered as change of circumstance.

17. It is admitted that when the first interim order was passed by the learned Magistrate on 11.10.2007, the Petitioner herein has not chosen to file any counter and he has not

made any submission on his behalf. Though the opportunity was given to the Petitioner herein, he had not chosen to utilise which amounts to remaining ex parte. Therefore, it is to be construed that the order passed by the learned Magistrate on 11.10.2007 is only an ex parte order. Further while passing that order, the learned Magistrate has not given any reasons for granting the relief and it is non-speaking order and it was not an order on merits.

18. The next question to be decided is that whether against that said ex parte order, only an appeal should be filed u/s 29 of the Act or application u/s 25(2) could be filed for the modification or revocation of the order.

19. Section 25(2) of the Protection of Women from Domestic Violence Act, 2005 is as follows:

25. Duration and alteration of orders:

(1).....

(2) If the Magistrate, on receipt of an application from the aggrieved person or the Respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate.

20. Section 29 of the said Act, is as follows:

29. Appeal: There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the Respondent, as the case may be, whichever is later.

21. It is held by the Honourable Kerala High Court in its decision reported in 2007 Crl.L.J 2057 Sulochana v. Kuttappan and Ors. as follows:

17. The learned Counsel for the Respondents contends that a person who has suffered an ex parte interim order u/s 23 can always go before the Magistrate and request for modification/vacation of the interim order or not to extend the interim order u/s 23. But the mere fact that such a course is available to him cannot at all persuade the Court to hold that such an interim order will be beyond the purview of Section 29 and no such appeal would at all be maintainable. In this context, I again look at the possible interim orders that can be passed u/s 23 read with Sections 18 to 22. I have no hesitation to agree that such interim orders passed u/s 23 read with Sections 18 to 22 would affect the rights of parties substantially and provisions for appeal u/s 29 will be available against such orders also.

21. The counsel for the Petitioners raises a further contention that u/s 12(4) normally an ex parte interim order will have a life of only 3 days that it is not necessary in these

circumstances to confer on a person who has suffered an ex parte interim order with a right to appeal u/s 29. I am unable to accept this contention. Of course, u/s 12(4), the first date of hearing must be within 3 days of the date on which the Court passes the order. But the ex parte interim order may live longer. Moreover, in a case depending on the place where the Respondent is, the date of first hearing may suitably be fixed on a later date and in such event also, the period of life of the interim order may be longer. The mere fact that the Respondent who has suffered the interim order can go to the Magistrate seeking modification of the order passed u/s 23 and can secure an order with expedition is also according to me no ground to interpret Section 29 to exclude any right of appeal against an interim order u/s 23.

22. I have no hesitation to agree with the learned Counsel for the Petitioner that ordinarily and normally a person who has suffered the order would do well to appear before the learned Magistrate and pray for modification/vacation of the interim order or not to extend the interim order passed u/s 23. A Court considering the entertainment of an appeal against an interim ex parte order u/s 29 will certainly be conscious of this fact - that the aggrieved persons can approach the Magistrate who passed the interim order and seek its variation u/s 23 read with Section 28(2) of the Act. A Court considering admission of an appeal u/s 29 must always remind itself of the fact that such a course/remedy is available to the aggrieved person and as a reasonably prudent person, a Court will certainly look for answers as to whey without and before exhausting that remedy resort is made to the provisions u/s 29 to prefer an appeal. But that is not to say that an appeal is not maintainable. Only in an appropriate case need the powers u/s 29 be invoked and the appeal entertained. That discretion vests with the appellate Court.But the jurisdiction or the competence to entertain an appeal cannot be doubted.

23. The learned Counsel for the Petitioners further submits that an order of stay has been granted without due and proper application of mind. I find force in this submission. The Court had not even referred to the contentions of the parties. The nature of the order of suspension passed also reveals that there has been no due and proper application of mind. In the same manner in which a sentence is suspended, an order of suspension has been passed also. An appellate Court considering the admission of an appeal and considering grant of stay against the interim orders appealed against, must certainly and alertly consider all the circumstances and then only grant interim orders of suspension. Not to do so, would be to do violence to the statutory rationale underlying a welfare statute enacted by the Parliament. I am in agreement with the learned Counsel for the Petitioner that great care and caution must be applied before granting ex parte orders of suspension/stay in appeals preferred u/s 29 of the Act.

From the above decision, it is made clear that an order passed u/s 23, an appeal may be preferred u/s 29 of the Act. At the same time, it is open to the aggrieved party seek for remedy u/s 25 of the Act before the same Court. Neither Section 25(2) excludes the right of the party u/s 29 of the Act to prefer an appeal nor Section 29 prevents the party from seeking the remedy u/s 25(2) of the said Act. At the same time for invoking provision u/s

25(2), there must be a change in the circumstance after the order being passed.

22. The next question in this case is that whether the learned Magistrate had noticed any change of circumstance to modify the order by invoking Section 25(2) of the Act. It has been observed by this Court already that the order passed by the learned Magistrate on 11.10.2007 was not a speaking order. A petition has been preferred u/s 25(2) of the Act by the Petitioner herein and he had made his submission before the learned Magistrate. When a party was not heard in earlier circumstance, but subsequently heard, it could be considered as a change of circumstance. Therefore an exparte order passed u/s 23(2) could be altered, modified or revoked by the same Court on an application from the aggrieved person u/s 25(2) of the said Act.

23. It is true that this Act is for the benefit of a women, at the same time, it should not be causing trouble or injustice to men. The learned Magistrate must have been careful while granting ex parte order u/s 23 of the Act. Only after the Magistrate satisfying himself with great care and caution must pass ex parte interim orders only to the extent necessary.

24. It is true that there is some dispute among the husband and wife and even with regard to the ownership of the property. It is open to the Petitioner herein to file his counter and also let in evidence with regard to his contention that he had spent money in the house property and he has got right over the property. It is an admitted fact that both the husband and wife were living in the same house and as such directing the husband to remove himself from the shared household must be only in extreme and compelling circumstance. Though the provisions are already declared to be constitutionally valid by this Honourable High Court, the Magistrate must exercise the power with great care and caution, especially in granting ex parte orders.

25. In the result, the judgment passed by the learned Principal Special Judge, Puducherry in Crl.M.P. No. 24 of 2008 is set aside and the order dated 23.05.2008 passed by the learned Judcial II, Puducherry in Crl.M.P. No. 543 of 2008 is restored. The revision petition is allowed accordingly. Consequently, M.P.I of 2009 is closed.