
(2013) 2 RCR(Civil) 35

Madras High Court (Madurai Bench)

Case No: Criminal R.C. (MD) No. 544 of 2012 and M.P. (MD) No. 2 of 2012

S. Srikanth

APPELLANT

Vs

Divyalaxmi

RESPONDENT

Date of Decision: Nov. 23, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Protection of Women From Domestic Violence Act, 2005 - Section 12, 18, 19, 20, 20

Citation: (2013) 2 RCR(Civil) 35

Hon'ble Judges: M. Venugopal, J

Bench: Single Bench

Advocate: J. Lawrance, for the Appellant; A. Hariharan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

M. Venugopal, J.

The petitioner/First Respondent/First Accused has preferred the present Criminal Revision Petition as against the order dated 14.12.2011 in CrI. M.P. No. 2669 of 2011 in CrI. M.P. No. 957 of 2011 in C.C. No. 55 of 2011 (now renumbered as CrI. M.P. No. 5 of 2012) passed by the Learned Judicial Magistrate No. 2, Dindigul. The Learned Judicial Magistrate No. 2, Dindigul, while passing the orders in CrI. M.P. No. 2669 of 2011 (filed by the revision petitioner to set aside the Ex parte order dated 10.2.2011, passed in CrI. M.P. No. 957 of 2011) on 14.12.2011, has inter alia observed that as per Section 29 of the Protection of Women from Domestic Violence Act, 2005, an Appeal has to be preferred within 30 days to the Court of Sessions and that the present Petition has been filed after lapse of 30 days i.e. on 18.4.2011 (from the date of passing of the order i.e. on 10.2.2011) and inasmuch as the Appeal is to be preferred to the Court of Sessions as per Section 29 of the Act and also that no proper explanation/reason has not been assigned for filing of the Petition and as such, the said petition is not liable to be accepted and

resultantly, dismissed the application without cost.

2. It is the contention of the Learned counsel for the revision petitioner that the impugned order dated 14.12.2011 in Cr. M.P. No. 2669 of 2011 has been passed by the Learned Judicial Magistrate No. 2, Dindigul, contrary to the facts and circumstances of the case and also in violation of Section 25(2) of the Protection of Women from Domestic Violence Act, 2005.

3. The Learned counsel for the revision petitioner urges before this Court that the interim order of maintenance passed by the Trial Court in Cr. M.P. No. 957 of 2011 in C.C. No. 55 of 2011 on 10.2.2011 is only an ex parte order and furthermore, no reason has been assigned by the Learned Judicial Magistrate, while passing the said order.

4. Added further, it is the submission of the Learned counsel for the revision petitioner that an ex parte order dated 10.02.2011 in Cr. M.P. No. 957 of 2011 in C.C. No. 55 of 2011 passed as per Section 23(2) of the Act can be altered, modified or revoked by the concerned Court, based on an application from the aggrieved party, as per Section 25(2) of the Protection of Women from Domestic Violence Act, 2005.

5. Finally, it is the contention of the Learned counsel for the petitioner that the impugned order dated 14.12.2011 in Cr. M.P. No. 2669 of 2011 has been passed without taking into consideration the necessary averments made by the Petitioner and in any event, the award of interim maintenance of Rs. 5,000/- ordered by the Trial Court is an excessive and arbitrary in the eye of law.

6. The Learned counsel for the revision petitioner cites the decision of this Court in [Alexander Sambath Abner Vs. Miron Lada, Jenitha and Abner Sebastian Oscar, represented by their mother Miron Lada](#), wherein, it is held as follows:

Neither Section 25(2) excludes the right of the party u/s 29 of the Protection of Women from Domestic Violence 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.

When a party was not heard in earlier circumstance, but subsequently heard, it could be considered as a change of circumstance. Therefore an ex parte 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 Protection of Women from Domestic Violence Act (2005).

7. Per contra, it is the submission of the Learned counsel for the respondent/Wife (petitioner) that the respondent as petitioner filed Cr. M.P. No. 957 of 2011 before the Trial Court u/s 23(2) of the Act, claiming a sum of Rs. 10,000/- for monthly relief from the revision petitioner for the period from October 2009 and the Trial Court, on 10.2.2011, passed an ex parte order inter alia stating that the respondent viz., the revision petitioner and others, have not appeared and finally, directed the revision petitioner/First

Respondent to pay a sum of Rs. 5,000/- to the respondent/wife until further orders and directed the matter to be called on 25.2.2011.

8. Advancing his arguments, it is the submission of the Learned counsel for the respondent/wife that the, revision petitioner has projected CrI. M.P. No. 2669 of 2011 in C.C. No. 55 of 2011 before the Trial Court after a lapse of 30 days, u/s 25(2) of the Act and that the Trial Court, after contest, has rightly dismissed the said Miscellaneous petition among other things observing that the Revision Petitioners a remedy to prefer an appeal within 30 days from the date of passing of the order dated 10.2.2011 in CrI. M.P. No. 957 of 2011 and in the instant case, the petitioner has filed CrI. M.P. No. 2669 of 2011 after a lapse of 30 days i.e. on 18.4.2011 and moreover, he has not adduced any satisfactory explanation for filing CrI. M.P. No. 2669 of 2011 before the Trial Court and consequently, rightly dismissed the said application, which at this distance point of time need not be interfered with by this Court sitting in Revision.

9. The Learned counsel for the respondent/wife cites the decision of this Court in Alexander Sambath Abner v. Miron Lada (supra), wherein it is inter alia observed that mere an order passed u/s 23 of the Act, an Appeal may be preferred u/s 29 of the Act and also that for invoking provision u/s 25(2) of the Act, there must be change in the circumstances after the order being passed.

10. The Learned counsel for the respondent/wife cites the order of this Court dated 11.10.2011 in CrI O.P. (MD) No. 5297 of 2011 between A. Chandravathy and 3 Others v. S. Divyalaxmi (the respondent/wife), wherein, this Court has directed the proceeding in C.C. No. 55 of 2011 pending on the file of the Learned Judicial Magistrate No. 2, Dindigul to be treated as the petition of the respondent/wife as complaint and. quash the order of taking cognizance. Furthermore, the Learned Judicial Magistrate has been directed to treat the case as miscellaneous case against the petitioners and the Husband of the respondent in the said Criminal Original Petition and disposed of the same on merits etc.

11. The Learned counsel for the respondent/wife brings it to the notice of this Court that the respondent/wife also filed M.C. No. 11 of 2011 before the Learned Chief Judicial Magistrate, Dindigul u/s 125 of Cr.P.C., claiming maintenance from the revision petitioner/Husband and on 14.9.2012, the Wife has been granted a relief of Rs. 3,000/- per month to be paid as maintenance by the respondent for payment of arrears within a period of one month from the date of filing of the petitioner viz., 28.3.2011 and it appears that a Criminal Miscellaneous Petition has been filed by the respondent/wife and the same is pending before the Learned Chief Judicial Magistrate, Dindigul. Before that, to execute the orders dated 10.2.2011 passed in CrI. M.P. No. 957 of 2011 in C.C. No. 55 of 2011 passed by the Trial Court, it appears the respondent/wife has filed CrI. M.P. No. 2668 of 2011 on 4.12.2011 and the same is still pending.

12. The Learned counsel for the respondent/wife submits that for nearly 25 months, the Petitioner/Husband has not paid the arrears.

13. Before dwelling deep into the rival contentions advanced by the Learned counsel appearing for the parties, it is useful for this Court to extract Section 23 of the Protection of the Women from Domestic Violence Act, 2005, which runs thus:

23. Power to grant interim and ex parte order.-

(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 Ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Sections 18, 19, 20, 21 or, as the case may be, Section 22 against the respondent.

That apart, Section 25 of the Act speaks of duration and alteration of orders, which is extracted hereunder:

25. Duration and alteration of orders:-

(1) A protection order made u/s 18 shall be in force till the aggrieved person applies for discharge.

(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.

Continuing further, this Court aptly points out Section 29 of the Act, which runs 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.

14. A reading of the ingredients of Section 23 of the Protection of Women from Domestic Violence Act, 2005, shows that even without issuing notice to the respondent in a given case, ad interim order as per Section 23(2) of the Act can be passed. However, the said order is to be made absolute with or without modification, after serving notice on the respondent. If the Respondent has not appeared, then an ex parte order as per rule 12(3) can be passed u/s 23(1) of the Act. If the respondent on appearance makes an objection, after hearing the respondent, an appropriate order can be passed as per Section 23(1) of the Act. It is to be borne in mind that the order passed under sub-section (2) of the Act will only be of ad interim in nature as per decision in *Preceline George v. State of Kerala*, 2010 (1) KHC at page 417 at special page 423.

15. It cannot be gainsaid that the Learned Judicial Magistrate must be circumspect and act with care and caution while passing an ex parte order based on Affidavit (furnished by the party) as per Section 23 of the Act. By passing an ex parte interim order, the Learned Judicial Magistrate has to subjectively satisfy himself as to the existence of valid reasons for passing such an order.

16. At this juncture, this Court worth recalls the decision of [ADIL and Others Vs. State and Another](#), wherein, it is held that the Judicial Magistrate must exercise the power with great care and caution especially while granting ex parte orders.

17. In the present case on hand, in Crl. M.P. No. 957 of 2011, the Learned Judicial Magistrate has passed an order on 10.2.2011 stating that the Petitioner/Wife is not allowed to live with the Respondent/Husband from October 2009 and further she has deserted by the Husband and now she is residing with parents and consequently passed an ex parte order against the revision petitioner (First Respondent in Crl. M.P. No. 957 of 2011), directing him to pay a sum of Rs. 5,000/- to the Wife until further orders.

18. It is needless for this Court to point out when a Court of Law passes even an Ex parte order, it must apply its mind dispassionately and ought to pass a reasoned speaking order so as to enable the Higher/Appellate Forum/Revisional Court to know the facts and circumstances under which the said order has come to be passed. Also, even in an ex parte order, there must be an outline of process of reasoning should be there. As opined by this Court, an ex parte non speaking order may be just from the point of view of the Court passing the same. But, to an affected or aggrieved party, the said non speaking order (bereft of quantitative and qualitative details) is clearly an unjust one, in the considered opinion of this Court.

19. At this stage, this Court to prevent an aberration of justice and to promote substantial cause of justice, cite the following decisions:

(i) In the decision in Dilip Bhattacharjee @ Raghu Bhattacharjee, Son of Late Naresh Bhattacharjee v. The State of Bihar and others, decided on 13.10.2009, in para 3, it is inter alia held as follows:

3 Further, on reading of Section 23 of the Act, it is clear that the interim power has been given for an interim protection from domestic violence. It is not an order for interim maintenance that is contemplated in a Partition Suit being decided in a domestic Violation case which, on the face of it, would be arbitrary and on strength thereof conferring power to decide maintenance aspects in this jurisdiction would clearly be beyond jurisdiction. It is simpliciter a money claim being settled and interim order being passed in that regard. That surely cannot be permitted. That would be clearly an abuse of process of Court.

(ii) In [Karthikeyan Vs. Sheeja](#), it is held as follows:

The impugned order is certainly one affecting the rights of the petitioner. He wants the ex parte order to be set aside. He can either challenge the ex parte order passed on merits. In the alternative, he can only request the Court to set aside the ex parte order. When that application to set aside the ex parte order is dismissed on the ground that such a petition will not lie, the said finding/order is according to me certainly an appealable order u/s 29 of the Act. The petitioner must have challenged the order by a properly instituted appeal u/s 29 of the Act.

(iii) In decision in [P. Chandrasekhara Pillai Vs. Valsala Chandran and Another](#), it is laid down as follows:

Court is unable to understand the provisions of Section 23 as compulsorily insisting on any separate application for interim order u/s 23. An application referred to in Section 23(2) is obviously an application u/s 12 claiming relief under Sections 18 to 22. It is impossible to understand the expression "an application" in Section 23(2) as importing a requirement that a separate application must be filed to claim the relief of an interim order u/s 23. Doubts, if any, on this aspect pale into insignificance when we consider that Section 23 only insists on an affidavit in such form as may be prescribed to justify the claim for an interim order and ad interim order u/s 23. Rules prescribe the form of affidavit also. From the plain language employed by the Statute in Section 23, it is impossible to spell out an insistence that a separate application u/s 23 must be filed in order to clothe the Court with the requisite jurisdictional competence and the claimant with a right to claim the relief of an interim order u/s 23.

(iv) In decision [Sunil @ Sonu Vs. Sarita Chawla \(Smt.\)](#), it is held that "on the facts and circumstances of the case, where, no amount of maintenance has been paid by the petitioner, no illegality was committed by the Trial Court in initiating proceedings u/s 31 of the Protection of Women from Domestic Violence Act, 2005.

20. Apart from the above, as per Section 24 of the Protection of Women from Domestic Violence Act, 2005, the onus is certainly on the Learned Judicial Magistrate to ensure that copies of any order passed under the Act is furnished to the parties as well as others mentioned in Section 24 of the Act. Further, the Learned Judicial Magistrate must certainly ensure that the copies are also prepared and are ready to be furnished to the individuals including the adversary in the litigation before the order is pronounced. That would be the only manner in which the mandate of Section 24 of the Act can be applied in letter and spirit as per the decision in Jose v. State of Kerala, 2007 (2) K.L.T. 386 at page 387 (Ker).

21. This Court worth recalls the decision in Ramesh Chand v. State of NCT of Delhi, 2009 (5) R.C.R. (Criminal) 937 : 2009 (1) JCC 520 at page 521 (Delhi), wherein, the petitioner has been permitted to withdraw the petition (quashing of complaint and summoning of order) with liberty to file an Appeal before the Learned A.S.J. within one week i.e. on or before 16.1.2009 and also the interim protection has been extended for a period of one

week i. e. 9.1.2009 to 16.1.2009.

22. Inasmuch as, as per Section 29 of the Act, the right of appeal is provided to the revision petitioner as against the order dated 10.2.2011 in CrI. M.P. No. 957 of 2011 passed by the Learned Judicial Magistrate, u/s 23 of the Act, this Court comes to an inescapable conclusion that the instant Revision Petition filed by the Petitioner/Husband (First Accused) is per se not maintainable in the eye of law, because of the fact that the Special Act viz., 43 of 2005, overrides the general remedy provided under Code of Criminal Procedure. Resultantly, the Criminal Revision Petition fails. In the result, the criminal revision petition is dismissed as not maintainable per se in law. No costs. Consequently, connected Miscellaneous Petition in M.P. (MD) No. 2 of 2012 is also dismissed. However, it is open to the revision petitioner to prefer an appeal as per Section 29 of the Protection of Women from Domestic Violence Act, 2005 and in the manner known to law before the Competent Court of Sessions. As and when the said Appeal is filed by the revision petitioner/Accused, it is open to him to raise all legal and factual pleas (including whether a power is conferred to the Learned Judicial Magistrate u/s 23 of the Act 43, 2005 to pass an interim order of maintenance and decide the same etc.) before the Appellate Court and to seek appropriate remedy, if so advised. The Appellate Court is directed to provide adequate opportunities by adhering to the principles of natural justice in true letter and spirit.