

Equivalent citations: 2008 CriLJ 264, I (2008) DMC 1, 2007 (4) MPHT 62

Bench: B M Gupta

Ajay Kant And Ors. vs Smt. Alka Sharma on 19/6/2007

ORDER

Brij Mohan Gupta, J.

1. The instant petition is for impugning the order dated 18th January, 2007 passed by Judicial Magistrate First Class, Gwalior in Criminal Case No. 848/07, whereby the learned Magistrate had issued notice to the petitioners on an application filed by the respondent under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the Act").

2. Brief facts of the case are that respondent Smt. Alka Sharma has filed one application under Section 12 of the Act against the petitioners. On which the learned Magistrate, vide order dated 18th January, 2007, has issued notices to the petitioners. It has been averred in the application that the respondent has married with petitioner No. 1 on 16th of May, 2005 at Gwalior. For a period of 4-6 months she became pregnant and thereafter the petitioners started harassing the respondent demanding Rs. 2 lacs and one Maruti car from her parents. As the father of the respondent is a pensioner, he could not fulfill the demand. He reported the matter to Mahila Police Station at Padav, Gwalior on 2nd November, 2005 but the report was not lodged and no action was taken. On 3rd February, 2006 the respondent delivered a male child in the hospital. Thereafter, on 17th February, 2006 the petitioners separated the child from the respondent, kept him alongwith them and deserted the respondent. Consequently, since 20th February, 2006 she is living in her matrimonial home without her son. Petitioners are trying to declare the respondent as mentally sick and to remarry the petitioner No. 1. Admittedly, one application for divorce has been filed by the petitioner No. 1 against the respondent and the respondent has filed an application under Section 125 of Cr.PC claiming maintenance from him and also she has filed another application under Section 9 of the Hindu Marriage Act for seeking a decree of restitution of conjugal rights against the petitioner No. 1. These applications are pending in the Family Court, Gwalior. On these grounds, the respondent has prayed in the application for taking legal action against the petitioners and also to punish them.

3. The aforementioned act of filing of the application by the respondent and issuance of notice by the Court against the petitioners has been assailed by the petitioners on various grounds. The grounds and decisions thereon are as under:

(A) That, the respondent was mentally sick before the marriage which was not disclosed by the respondent. On this ground, application for divorce has been filed by petitioner No. 1 on 15-5-06 in which proceedings for reconciliation have been failed on 21-9-06. Only for creating pressure against the petitioner No. 1, the present application has been filed on false grounds by the respondent on 23-11-06.

(B) That, in the application under Section 9 of the Hindu Marriage Act filed by the respondent these facts have not been mentioned by her that on demand of Rs. 2 lacs and one Maruti car, she has been harassed by the petitioners and as such the application being on false grounds, proceedings based on it ought to be quashed.

The grounds in the application are false or not, this fact cannot be decided by this Court during this summary proceeding under Section 482 of Cr.PC. The truthfulness or otherwise of the facts mentioned in the application can be decided by the learned Magistrate after due inquiry under the procedure as prescribed by the Act. Hence, the proceeding based on the application cannot be quashed by this Court at this stage on these two grounds.

(C) That, as provided by Section 2(q) of the Act, such application under Section 12 of the Act cannot be filed against the petitioner Nos. 3 and 4 who are the ladies. In Section 2(q) of the Act the term respondent has been defined as under:

(q) "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.

Thus, it is provided by this definition that an application can be filed by an aggrieved person including the respondent claiming relief under the Act only against the adult male person. However, as per the proviso appended to this provision, a 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. For understanding these two parts, i.e., the main part of the Section and the proviso, it is necessary to understand the scheme of the Act. The first three paragraphs of the statement of object and reasons under which the Bill No. 116 of 2005 for passing the Act was placed before the Parliament, are as under (published in the Gazette of India Extraordinary Part II Section 2 Page 22 dated 22nd August, 2005):

Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law, which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

(Emphasis supplied)

Keeping these objects and reasons in mind to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto, the bill was presented before the Parliament which has become the Act after passing the same by the Parliament. Thus, it cannot be lost sight of that the Act has been passed keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. Thus, basically the Act has been passed to provide the civil remedy against domestic violence to the women. However, as provided by Sections 27 and 28 of the Act, a Judicial Magistrate of the First Class or the Metropolitan Magistrate has been empowered to grant a protection order and other orders and to try the offence under the Act. Vide Section 28 of the Act, it is mentioned that save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and the offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. Vide Sub-sections (3) and (4) of Section 19, it is also provided that a Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence and such order shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 and shall be dealt with accordingly. Chapter VIII of Cr.PC dealt with security for keeping peace and for

good behaviour which runs from Sections 106 to 124. In these Sections, it is provided that for keeping the peace and maintaining good behaviour, a person can be directed by a Magistrate to execute a bond with or without sureties and in case of non-compliance of such order, that person can be detained into custody. Section 31 of the Act provides penalty for breach of protection order passed by the Magistrate, which is punishable as an offence. A protection order can only be passed under Section 18 of the Act. To understand better the provisions of Sections 18 and 31 are required to be perused, which are as under:

Section 18. The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from--

- (a) committing any act of domestic violence;
- (b) aiding or abetting in the commission of acts of domestic violence;
- (c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;
- (d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;
- (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her Stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;
- (f) causing violence to the dependents, other relatives or any person who give the aggrieved person assistance from domestic violence;
- (g) committing any other act as specified in the protection order.

Section 31. (1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under Sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under Sub-section (1), the Magistrate may also frame charges under Section 498A of the Indian Penal Code or any other provision of that Code or the Dowry Prohibition Act, 1961, as the case may be, if the facts disclose the commission of an offence under those provisions.

The offence under Section 31 of the Act will be cognizable and non-bailable as provided under Section 32 of the Act.

Section 8 of the Act provides for appointment of the Protection Officer and Section 33 of the Act provides for penalty for not discharging duty by the Protection Officer. Despite, as mentioned in the objects and reasons that for providing a civil remedy, this Act has been enacted, the provisions of Sections 19, 27, 28, 31 to 33 clearly mention that some of the proceedings under the Act are of criminal nature. Under Sections 19 to 22 of the Act an order to provide residential facilities, monetary reliefs, custody order for a child and compensation can be ordered by the Magistrate under the Act. Except a part of Section 19 with regard to direction of

execution of a bond and dealing the same as provided under Chapter VIII of the Cr.PC, all the reliefs under Sections 18 to 22 appear to be of civil nature. Thus, some of the proceedings under this Act can be said to be of civil nature and some of the proceedings can be said to be of criminal nature.

Section 12 of the Act provides that an application (not a complaint) for seeking one or more reliefs under the Act can be filed. On perusal of Sections 18 to 22 of the Act, it appears that the reliefs under these Sections as mentioned hereinabove can be passed on the application under Section 12 of the Act.

The word complaint as appeared in the definition of respondent under Section 2(q) of the Act has not been defined anywhere in the Act. Although it is not provided that the definition of complaint can be considered the same as provided under the Cr.PC but at the same time it is also not prohibited. In view of this, the definition of complaint can appropriately be seen in Cr.PC which goes as under:

2. (d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

It is clear by this definition that a complaint as provided in Cr.PC can only be for an offence. As mentioned hereinabove only two offences have been mentioned in this Act and those are (1) under Section 31 and (2) under Section 33. It appears that this word complaint appeared in the definition of respondent has been used for initiating proceedings for these two offences and an aggrieved wife or female living in a relationship in the nature of a marriage has been given a right to file a complaint against a relative of the husband or the male partner. This word complaint cannot be considered beyond the scope of the main provision of this Section which has been defined in first part of Section 2(q) that is for any relief under this Act. As provided in Section 31 of the Act, a complaint can be filed against a person who has not complied with a protection order or interim protection order.

Thus, it is clear by the definition of respondent that for obtaining any relief under this Act an application can be filed or a proceeding can be initiated against only adult male person and on such application or under such proceeding, aforementioned protection order can be passed. Obviously those orders will also be passed only against the adult male person. As provided under Section 31 of the Act, non-compliance of a protection order or an interim protection order has been made punishable and as such it can be said that the complaint for this offence can only be filed against such adult male person/respondent who has not complied with the protection order. Hence, it is clear that the application under Section 12 of the Act which has been filed by the respondent against petitioner Nos. 3 and 4, who are not adult male persons, is not maintainable.

(D) The proceeding has also been assailed on the ground that before issuance of the notice, learned Magistrate has recorded the statement of the respondent which is not required. It is true that recording of statement as provided under Sections 200 and 202 of Cr.PC is not required before issuance of the notice because application under Section 12 of the Act is an application and not a complaint. However, this action of the learned Magistrate cannot be a ground for quashing the proceedings because as provided by Sub-section (2) of Section 28 of the Act, the Court/learned Magistrate is not prevented from laying down its own procedure for disposal of an application under Section 12 of the Act.

(E) The proceeding has also been assailed on the ground that no report from the Protection Officer under Section 12 of the Act has been called.

Sub-section (1) of Section 12 of the Act goes as under:

12. (1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider;

On perusal of the aforementioned proviso appended to the provision, it appears that before passing any order on the application, it is obligatory on a Magistrate to take into consideration any report received by him from the Protection Officer or the service provider. Neither it is obligatory for a Magistrate to call such report nor it is necessary that before issuance of notice to the petitioners it was obligatory for a Magistrate to consider the report. The words before passing any order provide that any final order on the application and not merely issuance of notice to the respondent/the petitioners herein. The words any report also mention that a report, if any, received by a Magistrate shall be considered. Thus, at this stage if the report has not been called or has not been considered, it cannot be a ground for quashing the proceeding.

(F) The last ground raised by the petitioners is that in the application the relief of penalizing the petitioners has been prayed for, which is beyond the provisions of the Act. On perusal of the last paragraph of the application, it is prayed that after registration of the case, petitioners be legally penalized. It is true that at this stage in the application it was not required for the respondent to claim such relief, however, if it has been claimed, this cannot be a ground on which the proceedings can be quashed. At the most, such reliefs if unnecessary, can be negated.

4. Although it is not argued yet it appears appropriate to mention that any order passed by the learned Magistrate under the Act is appealable as provided by Section 29 of the Act. Usually when an opportunity to assail the impugned order in revision or appeal is available, taking recourse under Section 482 of Cr.PC is not required. However, it is observed by the Apex Court in Para 26 in the case of Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors. , that sometime for immediate relief Section 482 of the Code or Article 227 may have to be resorted to, for correcting some grave errors that might be committed by the Subordinate Courts. Considering the steps taken by the learned Magistrate against the petitioner Nos. 3 and 4, this petition has been considered herein.

5. In view of all, as discussed hereinabove, the petition deserves to be partly allowed. Consequently, it is partly allowed. The proceeding against petitioner Nos. 3 and 4 is quashed. It is directed that the learned Magistrate will deal the application as provided under the various provisions of the Act and as observed hereinabove.