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IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 9<sup>TH</sup> DAY OF DECEMBER 2009

BEFORE

THE HON'BLE MR. JUSTICE JAWAD RAHIM

CRIMINAL REVISION PETITION NO.815/2009

BETWEEN:

Krishna Murthy Nookula,  
S/o N.K.Sheshachalapati,  
Aged about 41 years,  
R/at No.146, 3<sup>rd</sup> main road,  
Between 8<sup>th</sup> and 9<sup>th</sup> Cross,  
Chamarajpet, Bangalore.

...PETITIONER

(By Sri.S.Balan & Assts., Adv)

AND:

Y.Savitha w/o Krishna Murthy Nookula,  
Aged about 32 years,  
R/at No.156, Talaaki Nilaya,  
6<sup>th</sup> cross, Shasthrinagar,  
Bangalore-560 028.

...RESPONDENT

(By Sriyuths Goutham & Rajeshwar, Advs)

This Crl.R.P. is filed under Section 397 & 401 of the Cr.P.C. praying to set aside the order dated 5.1.2008 in Crl.Mis.No.435/2007 on the file of II ACMM, Bangalore, and in Crl.A.No.54/2008 on the file of the Addl.S.J. & P.O., FTC-IV, Bangalore, dated 5.10.2009, etc.,

This Crl.R.P. coming on for further hearing this day, the Court made the following:



ORDER

This revision petition is by the husband against the order dated 5.1.2008 in CrI.Mis.No.435/2007 passed under Sections 20 and 22 of the Protection of Women from Domestic Violence Act, 2005.

2. The petition is listed for admission after notice to the respondent. In response to which, the learned Counsel has represented her. Considering legal issues that arise for consideration, the petition is admitted and taken up for final disposal.

3. The contextual facts relevant for consideration are: Smt.Savitha the respondent herein filed a petition complaining of domestic violence against the revision petitioner and along with the petition filed an I.A. under Sections 20 and 22 of the said Act for grant of interim relief on the premise that she was married to the petitioner according to the Hindu rites and customs of their community and in this regard, the petitioner had compelled and received from her and her parents dowry. Despite incurring of huge expenses for marriage and presentation of gold ornaments to the extent of Rs.5 lakhs,



the petitioner was not satisfied and extracted Rs.1 lakh as dowry and further demanded additional amount of Rs.1 lakh as dowry. As it was not possible for her and her parents to succumb to such demands, he harassed her physically and mentally making her life miserable. However, out of the wedlock, two children are born that also did not solve the problem. She was totally depressed due to such acts of the petitioner. She and her children were rendered destitutes and are dependents on her family members. Since the conduct of the petitioner showed no material change, she chose to file a petition before the jurisdictional magistrate for relief under the provisions of the Protection of Women from Domestic Violence Act (hereinafter referred to as the Act, for brevity).

4. On presentation of such petition and I.A., the learned jurisdictional Magistrate issued prior notice and summoned the respondent. Respondent therein is the petitioner in this case. He entered appearance and filed counter affidavit against the application denying all the allegations of torture or domestic violence or that he had income of more than Rs.1 lakh and that he had



deliberately neglected to maintain the respondent and children.

5. The learned jurisdictional Magistrate considering the mandate of the provisions of the Act requiring expeditious disposal appears to have proceeded to conduct "enquiry" summarily. Accepting the grounds urged by the respondent herein (petitioner before him) in the affidavit where she had referred to quantum of income the petitioner rejected his contention of inability to pay the amount and passed the **impugned order fixing the maintenance at Rs.30,000/- per month that includes maintenance of the children as well.** Direction was also issued that he shall pay **Rs.50,000/-** towards medical expenses, **Rs.25,000/-** towards mental harassment. Though in the order, it is mentioned that the said direction shall be complied till further orders, the order undoubtedly is enforceable.

6. The petitioner being aggrieved it is before this Court urging following grounds:

i) That the impugned order is unsustainable as it has been passed without granting him full opportunity to



defend against the interim order directing him to pay maintenance;

ii) Non-grant of opportunity has deprived him the benefit of placing such material which is available with him to substantiate that he had a good case as on the date of passing of the order;

iii) The interim order is arbitrary, unjust and against the procedure prescribed by the Code of Criminal Procedure;

iv) The interim order is liable to be set aside as the magistrate has failed to conduct an inquiry as required under Section 23 or 28 of the Act.

7. In support of these grounds, learned counsel, Sri Balan, would contend that on the motion interlocutory application by the respondent, the magistrate did not grant an 'ex parte' order'. He had ordered prior notice of the application for grant of interim relief. In response to the notice, petitioner had entered appearance and sought for an opportunity to substantiate all grounds urged by him in the counter. It was incumbent on the magistrate to have conducted an inquiry which he failed to do. Therefore, the impugned order is unsustainable as it is passed merely on



the basis of affidavit filed by the respondent-wife without taking into consideration the grounds urged by the petitioner.

8. Per contra, learned counsel for the respondent-wife would contend that the impugned order suffers from no infirmity, legal or otherwise, as the provisions of Section 23 of the Act permits a magistrate to grant interim relief on an application for such relief. He submits that for grant of interim relief, all that the magistrate has to consider is prima facie case. That could be ascertained from the affidavit and other documents filed by the applicant, and no detailed inquiry is necessary for grant of interim order. Therefore, there is no ground to interfere with the impugned order.

9. Before I advert to the contentions urged by both sides, it is necessary to record there is no dispute that in the proceedings initiated by the respondent, she had filed an application for grant of interim relief, prior notice of which was given to the respondent. Therefore, the interim order impugned in this revision is not an 'ex parte order'. It is an order after prior notice to the respondent.



10. Thus, the question is, whether in a case of this nature, the magistrate is required to conduct an *inquiry* and if so what is the procedure he has to follow.

11. Section 23 is a provision undoubtedly benevolent in nature to provide speedy relief to the victim of domestic violence and in furtherance of the object, the provision is engrafted envisaging:

Section 23:

(1) "Proceedings 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* disclose that the respondent is committing, or has committed an act of domestic violence or that there is 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 section 18, section 19, section 20, section 21 or , as the case may be, section 22 against the respondent".



12. The language is clear and meaningful which leads no scope for doubt that the Magistrate before whom a report or an application regarding domestic violence is lodged, is empowered to grant interim relief with or without prior notice to the respondent in furtherance of the main relief that could be granted under Sections 19 to 22. But the question is of the procedure he needs to follow.

13. Reference to Section 28 is therefore necessary which provides for procedure. Section 28 reads thus:

**" 28. Procedure -** (1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offence under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973(2 of 1974).

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of Section 23".

14. In this context, it is relevant to examine the impugned order applying the provision of Section 23 of the Act. Grant of interim relief is provided by sub-section (1)





of Section 23 of the Act but sub-section 2 permits a magistrate to grant an 'ex parte order' as referred to above. Thus, the test is, whether the impugned order is an ex parte order without notice to the respondent, or is it an order after notice to the respondent. Thus, a distinction has to be drawn between an ex parte order passed granting interim relief and an order passed granting interim relief after notice to the respondent. If it is not an ex parte order, then the procedure prescribed by Code of Criminal Procedure as referred to in sub-section (1) of Section 28 of the Act becomes applicable. If it is an ex parte order, then the procedure prescribed by sub-section (2) of Section 23 of the Act would be applicable.

15. From sub-section (1) of Section 28, it is clear that for all actions in a proceedings under Sections 12, 18, 19, 20, 21, 22,23 and also under Section 31, the procedure for enquiry as prescribed by the Cr.P.C., 1973 shall be followed. Therefore, it can safely be concluded that even for grant of interim relief as is permissible under Section 23 (1) of the Act, procedure prescribed by the Code of Criminal Procedure has to be followed. However,

*for*

there is one exception which we must note from sub-section(2) of Section 28. It reads thus:

“ Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23”.

16. From the above, it is clear that despite the mandate of sub-section (1) of Section 28 that in all proceedings under the provisions referred to above including Section 23 (1) of the Act, shall be governed by the provisions of Code of Criminal Procedure, the proceeding under sub-section (2) of Section 23 need not be so. For disposal of an application by an ex-parte order under sub-section (2) of Section 23, the provision envisages that sub-section (1) of Section 28 shall not prevent the Court from laying down its own procedure for disposal of such application. In other words, though the procedure prescribed by Code of Criminal Procedure is made applicable for enquiry in a proceeding under Section 23 and the other provisions of the Act, proceedings referred to under sub-section (2) of Section 23 for granting ex-parte interim relief is excepted.



17. Sub-section (2) of Section 23 relates only to grant ex-parte orders. For clarity, the same is once again extracted;

“(2) If the Magistrate is satisfied that an application prima facie disclose that the respondent is committing, or has committed an act of domestic violence or that there is 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”.

18. From this, it is clear that the proceeding under sub-section(1) of Section 23 which permits to pass interim order has to be governed by the provisions of Code of Criminal Procedure by virtue of Section 28 (1) of the Act, but all actions in a proceeding for grant of **ex-parte** order would be by the procedure framed by the Court itself if any or on the basis of the affidavit in such form as may be prescribed. The ultimate conclusion would be for grant of **ex parte order**, the Magistrate need not necessarily apply provisions of Code of Criminal Procedure, but he could pass such orders on the basis of material in the form of affidavit in such form as may be prescribed or following



the procedure it has prescribed (if any). But when the magistrate declines to grant ex parte relief and notifies the respondent (prior notice), he has to be heard and in such cases, Section 28 (1) applies and the procedure prescribed by the Code of Criminal Procedure becomes applicable.

19. In the instant case, the Magistrate had declined to grant interim relief "ex-parte" on the motion made by the respondent. The learned Magistrate issued prior notice to the petitioner herein and therefore the order comes within the ambit of sub-section (1) of Section 23 and it is not an ex-parte order referred to in sub-section (2) of Section 23. Once sub-section(2) is inapplicable then sub-section (1) of Section 28 applies and necessarily procedure prescribed by Cr.P.C is to be followed. The legal consequences are that the procedure prescribed by the Code of Criminal Procedure for trial of cases depending upon the nature of offence and punishment prescribed becomes applicable and that procedure has to be followed.

20. The next question is, which of the procedures prescribed by the Code of Criminal Procedure for conduct of trial has to be applied to an inquiry under the Act. The



Code prescribes different procedures for trial of summons cases and warrant cases. It depends on the nature of offence committed and the punishment prescribed by the Indian Penal Code or other law for the time being in force. In other words, it is severity of the punishment which determines the procedure, whether it should be a summary trial to be conducted as summons case, or a trial applying the procedure for warrant cases depends on the punishment prescribed. The provisions of Sections 18, 19, 20, 21, 22 and 23 of the Act make contravention of the orders passed under the Act punishable as an offence under Section 31 of the Act. To try a person for contravention of any of the orders passed (interim or final) under the provisions referred to above, Section 31 of the Act would apply. It postulates, '*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.*' Thus, the punishment prescribed is imprisonment upto one year or fine upto Rs.20,000/-. Undoubtedly, the procedure



prescribed for summary trial, that is, summons case, has to be followed. Consequently, it has to be held that the procedure to conduct an enquiry for action under Sections 18, 19, 20, 21, 22 and 23 of the Act applicable is by the procedure prescribed by the Code of Criminal Procedure, 1973, (summons case) as the punishment prescribed under Section 31 is only up to one year. This is as envisaged under Section 28 of the Act.

21. Regarding merits, it is noticed that the impugned order has been passed on facts disclosed in the affidavit of the respondent-wife and no inquiry has been conducted. Petitioner had in fact filed a detailed counter denying the allegation of domestic violence or any other harassment. He has also averred he has no means as he has been retrenched from service. There is no enquiry regarding such defence.

22. Based on the discussion above, the impugned order being not an order passed ex parte, the learned magistrate was required to have held an enquiry as prescribed in the Code of Criminal Procedure (indicated above) and then to record his finding. Since that has not been done, the



matter requires remand. Thus the order impugned is unsustainable.

23. By the impugned order, the application under Sections 20 and 22 of the Act has been allowed, directing the petitioner to pay Rs.50,000/- towards medical expenses and Rs.25,000/- towards mental harassment. Both these directions are without inquiry and hence are unsustainable. The learned magistrate has further directed him to pay Rs.10,000/- p.m. for food, clothing and other basic necessities to the 1<sup>st</sup> petitioner therein and Rs.10,000/- each to the children, in all, Rs.30,000/-. Since it is opined that the matter requires remand for fresh inquiry into the claim of the respondents, the direction issued to the respondent-husband to pay Rs.50,000/- towards medical expenses and Rs.25,000/- as compensation for harassment is set aside. However, the direction regarding payment of monthly maintenance to the wife and children needs appropriate modification.

24. Taking into consideration all attending circumstances, and as it is brought to my notice that the petitioner herein has deposited Rs.4,05,000/-, the respondent are permitted to withdraw the same.



However, he is directed to pay Rs.8,000/- p.m. till further orders are passed by the magistrate on the application for interim relief.

25. The petition is, therefore, allowed. Impugned order is set aside. The learned trial judge is directed to reconsider the application filed by the respondent for grant of interim relief applying the procedure prescribed for trial of summons case under the Code of Criminal Procedure, after giving due opportunity to the petitioner and the respondent to lead such evidence as they may choose. Keeping in mind the requirement of the Act, the learned trial judge is directed to dispose of the matter as expeditiously as possible within an outer limit of three months from the date of receipt of a copy of this order.

Srl/vgh\*

**Sd/-**  
**Judge**