

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.03.2008

CORAM
THE HONBLE MR.JUSTICE M.JEYAPPAUL

Crl.R.C. Nos.48 and 148 of 2008 & M.P.Nos.1 of 2008

1. P.Babu venkatesh
2. Kandayammal
3. Padmavathi

.. Petitioners in both Crl.R.Cs.

vs.

Rani

.. Respondent in both Crl.R.Cs.

Revisions filed under Section 397 and 401 of Cr.P.C against the order passed by the learned Judicial Magistrate No.6, Salem in Crl.M.P. No.5231 of 2007 dated 31.12.2007.

For petitioners : Mr.G.Karthikeyan

For respondent : Mr.B.Kumaresan

O R D E R

Crl.R.C.No.48 of 2008 is filed challenging the order passed by the learned Judicial Magistrate No.6, Salem in Crl.M.P. No.5231 of 2007 dated 31.12.2007 and Crl.R.C.No.148 of 2008 is filed challenging the order dated 11.1.2008 passed by the very same learned Judicial Magistrate in CRL.M.P.No.176 of 2008.

2. The first petitioner is the husband, second petitioner is the mother-in-law and the third petitioner is sister-in-law of the respondent. Invoking the provision under section 23(2) of Protection of Women from Domestic Violence Act, 2005, the respondent sought for an ex-parte residence order in Crl.M.P.No.5231 of 2007.

3. In the affidavit filed by the respondent, she has stated that she was driven away from the matrimonial home and has been living without any food, cloth and shelter. She has further alleged in the said affidavit that she was driven away in the

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mid of night by beating her and as a result of which she did not have a roof to decide. Therefore, she has sought for an ex-parte residence order to be implemented by Mallur Police Station.

4. The learned Judicial Magistrate having adverted to the aforesaid allegations found in the affidavit in the background of the materials produced along with the main petition passed residence order in absentia of the petitioners herein. The said order is under challenge in CrI.R.C.No.48 of 2008.

5. The respondent thereafter filed a petition in C.M.P.No.176 of 2008 invoking the provision under section 31 of the Protection of Women from Domestic Violence Act, 2005 seeking to enforce the order already passed in CrI.M.P.No.5231 of 2007 alleging therein that the petitioners have locked the premises dishonouring the residence order passed by the learned Judicial Magistrate. **The learned Judicial Magistrate having heard both sides passed an order on 11.1.2008 directing the police to break open the lock and give protection to the respondent herein to reside in the house.** The said order is under challenge in CrI.R.C.No.148 of 2008.

6. The learned counsel appearing for the petitioners would vehemently submit that the subject house is neither the rental house nor the own house of the first petitioner herein. Therefore the subject house does not fall under the definition shared household found in Section 2(s) of the Protection of Women from Domestic Violence Act, 2005. **It is his further submission that the petitioners are prepared to provide alternate accommodation as contemplated under section 19(f) of the Act by shouldering the responsibility of paying rent therefor. He contends that a Divorce petition filed by the first petitioner herein is pending adjudication.** He would further submit that the learned Judicial Magistrate has not expressed his satisfaction based on the averment found in the affidavit filed by the respondent that the application did disclose a prima facie case of commission of an act of domestic violence or the likelihood of the commission of the said act. Therefore, the order passed bereft of any satisfaction expressed by the learned Judicial Magistrate is unsustainable. As regards the other order passed by the learned Judicial Magistrate to break open the lock in the subject house with the assistance of the police, he would submit that there is no specific provision under the Act to pass such an order passed by the learned Judicial Magistrate. It is his further submission that when the main application was posted on 21.1.2008 for counter, the interim application in CrI.M.P.No.176 of 2008 was taken up hurriedly on 11.1.2008 and the same was disposed. The learned Judicial Magistrate should have waited till the petitioners herein file a counter in the main application for the disposal of the interim application filed by the respondent seeking break open. In view of the above, the impugned order is not sustainable, he would submit.

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7. The learned counsel appearing for the respondent would contend that the first petitioner was the owner of the subject premises where both the first petitioner and the respondent resided as husband and wife. But, after the matrimonial dispute had arisen between the parties, the first petitioner has chosen to alienate the property in the name of the second petitioner on 20.4.2006. Even otherwise, the learned counsel appearing for the respondent would submit that the house of the second petitioner, which is in the permissible occupation of the first petitioner along with her wife shall be treated as shared household. He would further submit that the pendency of the Divorce Application has nothing to do with the protection order under the Protection of Women from Domestic Violence Act, 2005. Though the order does not specifically state that the learned Judicial Magistrate was satisfied with the averment found in the affidavit, the details graphically given by the learned Judicial Magistrate about the concrete allegations made in the application would go to show that the learned Judicial Magistrate having been satisfied passed the residence order. The suggestion emanated from the petitioners that they are prepared to offer alternate accommodation can be decided during the disposal of the main application filed by the respondent. As regards the other petition filed for breaking open of the lock in the premises, the learned counsel for the respondent would contend that the learned Judicial Magistrate is empowered under section 19(7) of the Act to give suitable direction to the officer incharge of the Police Station to assist the Court in the implementation of the protection order if any passed by the Court. Therefore, there is nothing wrong in the direction given by the learned Judicial Magistrate to break open the lock to accommodate the wife in the house where she last resided. The application seeking to break open the lock cannot be kept in abeyance till the petitioners herein file a counter leisurely in the main application. The merit or the otherwise of the interim application filed seeking to break open the lock will have to be decided expeditiously without waiting for any counter in the main petition. The learned Judicial Magistrate has rightly passed the order considering the urgency of the matter, he would further submit before this Court.

8. The Supreme Court in S.R.BATRA AND ANOTHER VS. TARUNA BATRA, 2007 (3) CTC 219 has held that shared household means only the house belonging to or taken on rent by the husband or house which belongs to the joint family in which the husband is one of the members. It has also been observed therein that the property exclusively owned by the mother of the husband cannot be called shared household, as per the definition found in Sec.2(s) of the Protection of Women from Domestic Violence Act, 2005. In the above case, it is found that wife had chosen to file a Suit seeking bare injunction restraining her husband and his mother from dispossessing the wife from the property in question. On facts, it is observed that the husband of the respondent therein had already shifted his residence to a flat in Ghaziabad before ever the litigation between the parties started. In such circumstances, the Supreme Court has held that the place where the wife alone was residing cannot be termed as a matrimonial home.

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9. But, in this case even before the litigation started, it is reported that both of them had resided in the subject house, which is now in the name of the second petitioner. Further, it is brought to the notice of this Court that after the dispute had arisen between the parties, the first petitioner, who was the original owner of the property alienated the same in favour of his mother, the second petitioner herein. Therefore, factually, the aforesaid ratio laid down by the Supreme Court can be distinguished. If the contention of the petitioners is accepted, every husband will simply alienate his property in favour of somebody else after the dispute has arisen and would take a stand that the house where they last resided is not a shared household and therefore the wife is not entitled to seek for residence right in the shared household.

10. As rightly pointed out by the learned counsel for the respondent, the pendency of the Divorce petition at the instance of the first petitioner has nothing to do with the interim orders sought for by the respondent invoking the provisions under the Protection of Women from Domestic Violence Act, 2005. The reliefs provided under the aforesaid Special Act will have to be granted in genuine cases, even during the pendency of the Matrimonial Case between the parties before the forum concerned.

11. On a careful perusal of the impugned order passed by the learned Judicial Magistrate in CrI.M.P.No.176 of 2008, it is found that the learned Judicial Magistrate has graphically described the various domestic violence alleged in the affidavit filed by the respondent herein. He has also observed that he had an occasion to go through the entire materials filed in the main petition. As rightly pointed out by the learned counsel appearing for the petitioners, the learned Judicial Magistrate has not observed in the order impugned that he was satisfied that the application prima facie disclosed that the petitioners were committing an act of domestic violence. In this context, the learned counsel for the petitioners cited an authority in Ponnammal and another vs. State, rep.by Revenue Inspector, Kinathukadavu and others, 2003(4) CTC 232, wherein this Court dealing with the criminal proceedings under section 145 of the Code of Criminal Procedure observed that any preliminary order passed under section 145(1) of the Code of Criminal Procedure without specifically stating the grounds of his satisfaction would amount to non-compliance of the provision under section 145(1) of the Code of Criminal Procedure.

12. Section 145(1) of the Code of Criminal Procedure provides that the learned Judicial Magistrate should not only be satisfied with the grounds set up that the dispute likely to cause a breach of peace exists concerning any land or water, but shall also state specifically the grounds of being so satisfied. Under such circumstances, this Court in the aforesaid authority has observed that the preliminary order passed under section 145(1) of the Code of Criminal Procedure without stating the grounds of his satisfaction would amount to non-compliance of the provision under section 145(1) of the Code of Criminal Procedure.

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13. Under section 23(2) of the Protection of Women from Domestic Violence Act, 2005, the learned Magistrate has to pass a protection order, when he is satisfied that the application prima facie discloses that the respondent is committing or has committed an act of domestic violence or that there is likelihood of commission of such domestic violence before ever he passes an ex-parte order on the basis of an affidavit filed by the wife.

14. What is important is the materials which formed a basis for the satisfaction of the learned Judicial Magistrate before passing an ex-parte order will have to be considered by the Court and not the parrot like repetition of the provision to the effect that he was satisfied based on the averments found in the application. In this case it is found that the various averments found in the application clearly disclose the commission of the act of domestic violence and the same has been incorporated in the order impugned. The absence of the phrase Magistrate is satisfied need not be found incorporated in the order passed under Section 23(2) of the Act. If the material analysed by the learned Judicial Magistrate discloses the allegation of commission of an act of violence, he is well within his powers to pass protection order under Section 23(2) of the Act.

15. Of course, the learned Judicial Magistrate is empowered to consider the suggestion emanated from the husband to provide alternate accommodation as contemplated under Section 19(f) of the Act, while passing a final order in the main application. It is after all an order passed ex-parte on the strength of the averment found in the affidavit filed by the aggrieved wife. Such a suggestion can be seriously considered by the Judicial Magistrate during the final disposal of the main application. In view of the above, the Court finds that the learned Judicial Magistrate has rightly passed the protection order. The said order does not suffer from any illegality or impropriety. Therefore, the question of setting aside the said order does not arise.

16. Coming to the order passed by the learned Judicial Magistrate giving a direction to the police authority concerned to break open the lock and give protection to the respondent to reside in the subject house, the Court finds that the learned Judicial Magistrate has ample power under Section 19(7) of the Act to give any order to the officer incharge to assist him in the implementation of the protection order. The interim residence order is one of the protection orders. Of course, the said provision does not specifically state that the learned Judicial Magistrate may direct the officer incharge to break open the lock. **To give effect to the protection order passed ex-parte, the learned Judicial Magistrate will have to necessarily pass an order break open the lock by the police. If the submission made on the side of the petitioners that the learned Judicial Magistrate is not empowered to give any order to break open the lock is accepted, then in all cases, the husband will lock the house and walk off and thereby depriving the wife from enjoying the**

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protection order passed under the Act. The Court finds that the aforesaid submission is against the spirit of the object and scheme of the benevolent Special Act.

17. The impugned order would reflect that the application seeking to break open the lock was filed on 9.1.2008 and the order thereon was passed on 11.1.2008. Of course, the impugned order would reveal that the main application was posted to 21.1.2008 for the counter on the side of the petitioners herein. The respondent cannot be made to wait and loiter in the street till the petitioners herein file their counter in the main application. On account of some urgency which has arisen, the interim applications are filed by the wife seeking protection order and also seeking assistance to implement the protection order. Therefore, the submission made by the learned counsel for the petitioners that the learned Judicial Magistrate should have waited till the counter is filed by the petitioners herein in the main application, is found not sustainable. It is a case where the petitioners also were heard before ever an order was passed.

18. Of course, some comment is made by the learned counsel for the petitioners that the learned Judicial Magistrate was pleased to pass an order at 8.30 p.m. on 11.1.2008. The Court is all praise for the learned Judicial Magistrate for passing the order at 8.30 p.m. without minding the time, considering the emergency in the application filed by the respondent. As otherwise the wife should take shelter only in the platform. There is nothing wrong in passing an order at 8.30 p.m., that too after hearing both sides. The Court finds that the order to break open the lock has been passed only after weighing the merits of the application. There is no impropriety or illegality in the said order. Therefore, both the Criminal Revision Cases fail and they stand dismissed. Consequently, the connected Miscellaneous Petitions are also dismissed.

25.03.2008

Index: Yes
Internet: Yes

ajr

To

1. The Judicial Magistrate, Thiruthuraipoondi.
2. The Inspector of Police,
Thiruthuraipoondi Police Station
Thiruvarur District
3. The Public Prosecutor, High Court, Chennai

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