

PGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

Writ Petition No.5252 of 2009

Mrs.Pramodini Vijay Fernandes	..	.. Petitioner
v/s.		
Mr.Vijay Fernandes	..	.. Respondent

Mr.R.N. Sanghavi for Petitioner.

Mr.Abhijit Sarwate i/by Mrs.Kokila Kalra for Respondent.

CORAM : SMT.ROSHAN DALVI, J

Date of reserving the order : 9th February, 2010

Date of pronouncing the order : 17th February, 2010

ORDER :

1.Rule, returnable forthwith.

2.The parties are wife and husband. The Petitioner (wife) has filed a Petition for divorce against the Respondent (husband) under Section 10 of the Indian Divorce Act, 1869. The Petitioner has taken out a Petition for the protection of herself and her child under Sections 18, 19, 20, 21 and 22 of the Protection of Women From Domestic Violence Act, 2005 (DV Act). An order came to be passed under the DV Act on 19.7.2008. That order is stated to have been breached. The

Petitioner took out an application under Section 31 of the DV Act upon violation of the order. The Family Court rejected the application on the ground that it did not have jurisdiction to pass any order under Section 31 of the DV Act. The Court also refrained from exercising its inherent powers under Section 151 of the Code of Civil Procedure (CPC). Section 31 of the DV Act lays down penalty for breach of protection of the order by the Petitioner. Section 31 of the DV Act runs thus:-

31. Penalty for breach of protection order by respondent : (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 498 A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

(Emphasis supplied)

3. Section 31, therefore, lays down the specific procedure to be followed giving jurisdiction to the Magistrate who had passed the order to punish for breach of any protection order which is specified to be an offence committed by the party breaching the order under the DV Act. That offence is punishable as mentioned in the section. The orders under Sections 18, 19, 20, 21 and 22 may be passed by a Magistrate or by a Civil or Criminal Court under Section 26 of the DV Act where a proceeding was initiated before such Court. Section 26 of the DV Act runs thus:-

26. Relief in other suits and legal proceedings:- (1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case, any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Consequently, therefore, though initial application is required to be made before a Magistrate for obtaining orders and reliefs under Section 12 of the DV Act, if a legal proceeding is already filed in a Civil or a Criminal Court affecting the aggrieved person and the Respondent, relief under Sections 18, 19, 20, 21 and 22 could be granted by such Civil or Criminal Court.

4. The Family Court follows the procedure laid down in the CPC under Section 10(1) of the Family Courts Act, 1984. Section 10(1) runs thus:

10. Procedure generally.- (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court.

(emphasis supplied)

5. Family Court is, therefore, a Civil Court. Where a proceeding is initiated in a Family Court, a protection order can be passed by a Family Court.

6. In this case, a divorce proceeding was pending in the Family Court affecting the Petitioner as the aggrieved person and her husband as the Respondent therein. An order came to be passed under Sections 18, 19, 20, 21 and 22 of the DV Act by the Family Court as aforesaid on 19.7.2008. The jurisdiction of the Family Court has not been challenged. Breach of the order under the aforesaid sections passed by the Family Court, as an interim protection in any legal proceeding already filed before it, by which certain reliefs are granted, are expected to be honoured and obeyed. If a breach is made of the order, which is an offence under the DV Act, the Court which passed the order is required to try it under Section 31(2) cited above. Since an order under the DV Act would normally be passed by the Magistrate upon the main application made before a Magistrate under Section 12 of the DV Act, Section 31(2) requires the offence of breach of the protection order or an interim order to be tried by the Magistrate who passed the order. Consequently, if the Magistrate does not pass such an order but a Civil or a Criminal Court, or the Family Court in a Family Court proceeding passes an order under the aforesaid sections of the DV Act as a protection order or an interim protection order such Court, which passed the order, would be not only entitled but obliged to try the offence of breach of its own order.

7. Consequently, the words Magistrate who had passed the order in Section 31(2) must be read as *Magistrate or a Civil or Criminal Court or a Family Court who had passed the order*. This applies to any legal proceeding which was pending before that Court, an application under the aforesaid sections is made before that Court and a protection order or an interim protection is passed by that Court.

8. Of course, for trying offence under Section 31(1) of the DV Act, such Court would require to frame charges under Section 31(3) of the DV Act.

9. Mr. Sarwate on behalf of the Respondent contended on behalf of the Respondent that though the Family Court can pass an order under Sections 18, 19, 20, 21 and 22, it has no jurisdiction to levy any penalty for breach of the order passed by it. This would be to say that the law which grants the relief does not grant the remedy to enforce the relief. Such an interpretation would be to frustrate justice. An interpretation of a legislation, specially a protective legislation as the DV Act, must be such as to enhance justice and not to frustrate it. It would be absurd if the Respondent allowed orders under Sections 18, 19, 20, 21 and 22 to

be passed as interim protection orders and breached them with impunity and impertinence on the ground that Section 31(2) confers jurisdiction only upon a Magistrate to try the offence for breach of a protection order.

10. In the case of **Union of India & anr. vs. Paras Laminates (P) Ltd., (1990) 4 SCC 453 at 457**, it has been held that the Customs Tribunal had powers conferred expressly by the Statute and being a judicial body it had all other incidental and ancillary powers which are necessary to make the express grant of the statutory powers fully effective. The ambit of the limits of its jurisdiction is, therefore, extended to such incidental and ancillary powers as inherent in the Tribunal. This is on the premise that the legislative intent of the power expressly granted in an assigned field of jurisdiction must be efficaciously and meaningfully exercised. Hence it is held that though the powers of the Tribunal are limited and the area of its jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted, implied grant being limited by the express grant. Hence all incidental powers, which would make the grant effective and would be reasonably necessary for that purpose are implicitly taken to be conferred in the Tribunal. This is upon the

principle of interpretation set out in that paragraph from Maxwell on Interpretation of Statutes (11th Edition) which runs thus:

where an Act confers a jurisdiction, impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution.

11. Similarly in the case of **Shail Kumari Devi & anr. vs. Krishan Bhagwan Pathak alias Kishun B. Pathak**, AIR 2008 SC 2006, it is held that the Magistrate, who is vested with the jurisdiction under Section 125 of the Criminal Procedure Code for granting maintenance to wives, children and parents, is conferred the power by necessary implication to pass interim orders of maintenance. It is held that he would have such a power in the absence of any express bar or prohibition under that section.

12. Further, since the Family Court is a Civil Court and has all the powers of a Civil Court, it can pass orders consequent upon disobedience of breach of its order under Order XXXIX Rule 2A of the CPC. Further the Family Court like any other Court has the inherent power under Section 151 of the CPC to pass such orders as would be just and equitable, including orders to effectuate its own orders. In this case, the

application of the Petitioner herein was specifically made under Section 31 of the DV Act.

13.The Family Court would, therefore, have the jurisdiction under Section 31(2) of the DV Act as the Magistrate which had passed the order of interim protection to frame charges under Section 32(3) of the DV Act and to levy the penalty under Section 32(1) of the DV Act for breach of its interim protection order. However, the Family Court would also have the jurisdiction to proceed under Order XXXIX Rule 2A of the CPC for breach and disobedience of its order and injunction.

14.Consequently, the order of the learned Judge, Family Court No.4, Pune, dated 7.5.2009 is set aside. The learned Judge, Family Court No.4, Pune, shall try the application of the Petitioner herein either under Section 31 of the DV Act or under Order XXXIX Rule 2A of the CPC for breach of its own order. For that purpose both the parties shall be entitled to file such applications / affidavits as required by both of them. The Writ Petition is allowed. Rule is made absolute accordingly.

15.No order as to costs.

(SMT.ROSHAN DALVI, J.)

Bombay High Court