

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. M.C. No. 3083/2011 & Crl.M.A. 10914/2011 (stay)**

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Reserved on: 17th January, 2012

Decided on: 5th March, 2012

SHAMBHU PRASAD SINGH

..... Petitioner

Through Mr. Tarkeshwar Nath, Mr. P.K.
Mishra, Advs.

versus

MANJARI

..... Respondent

Through Mr. Prashant Katara, Mr. Anuj
Sehrawat, Advs.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition, the Petitioner challenges the order dated 31st May, 2011 passed by the learned Metropolitan Magistrate in complaint case No. 934/2003 titled as 'Manjari Vs. Shambhu Prasad Singh' issuing notice to the Petitioner on a complaint under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (in short D.V. Act) without calling for a report from the Protection Officer and the order of the Learned Additional Sessions Judge dated 4th August, 2011 dismissing the appeal filed by the Petitioner.

2. Learned counsel for the Petitioner contends that on an application under Section 12 of the D.V. Act, no notice could have been issued to the Petitioner/ husband of the complainant without calling domestic inspection report from the Protection Officer as mandated under Section 12 of the D.V. Act. Reference is made to Sections 4, 5 & 12 of the D.V. Act and Rules 4, 5,

6, 8 & 9 of the Protection of Women from Domestic Violence Rules, 2006 (in short 'D.V. Rules'). It is contended that filing of form II is essential along with an application under Section 6 of the Act which specifically provides that it should be accompanied by the report of the Protection Officer. The report of Protection Officer is mandatory before issuance of notice as held in *Bhupender Singh Mehra & Anr. Vs. State of NCT of Delhi & Anr. 2010 (4) JCC 2939*. Thus, impugned orders be set aside.

3. Learned counsel for the Respondent on the other hand contends that Section 12 of the D.V. Act gives liberty to the complainant to apply directly to the Court or through the Protection Officer. Further Section 23 permits passing of ex-parte orders. The forms provided under the D.V. Rules 6(1 & 2) are not mandatory in nature. Distinguishing the decision of this Court in *Bhupender Singh Mehra* (supra), it is contended that in the said case the report of the Protection Officer was necessary as it was not clear whether the Petitioners therein were in domestic relationship. In the present case only the husband has been made as a Respondent in the application under Section 12 and there is no dispute to his being in domestic relationship.

4. I have heard learned counsel for the parties. The short issue involved in the present petition is whether at the time of issuance of notice i.e. taking cognizance on the complaint of the complainant, the Court is duty bound to issue notice to the Respondent only after the report of the Protection Officer is received. Before advertng to the issue, it would be appropriate to reproduce the relevant provisions of the D.V. Act and the D.V. Rules.

“2. Definitions.

(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.

4. Information to Protection Officer and exclusion of liability of informant.—

(1) Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer.

(2) No liability, civil or criminal, shall be incurred by any person for giving in good faith of information for the purpose of sub-section (1).

5. Duties of police officers, service providers and Magistrate.—

A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence or when the incident of domestic violence is reported to him, shall inform the aggrieved person—

(a) of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act;

(b) of the availability of services of service providers;

(c) of the availability of services of the Protection Officers;

(d) of her right to free legal services under the Legal Services Authorities Act, 1987 (39 of 1987);

(e) of her right to file a complaint under section 498A of the Indian Penal Code (45 of 1860), wherever relevant:

Provided that nothing in this Act shall be construed in any manner as to relieve a police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

12. Application to Magistrate.—

(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.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained

in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.

13. Service of notice.—

(1) A notice of the date of hearing fixed under section 12 shall be given by the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt.

(2) A declaration of service of notice made by the Protection Officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.

23. Power to grant interim and ex parte orders.—

(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 section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

Relevant provisions of the D.V. Rules are:

4. Information to Protection Officers.-

(1) Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed may give information about it to the Protection Officer having jurisdiction in the area either orally or in writing.

(2) In case the information is given to the Protection Officer under sub-rule (1) orally, he or she shall cause it to be reduced to in writing and shall ensure that the same is signed by the person giving such information and in case the information is not in a position to furnish written information the Protection Officer shall satisfy and keep a record of the identity of the person giving such information.

(3) The Protection Officer shall give a copy of the information recorded by him immediately to the informant free of cost.

5. Domestic incident reports.-

(1) Upon receipt of a complaint of domestic violence, the Protection Officer shall prepare a domestic incident report in Form 1 and submit the same to the Magistrate and forward copies thereof to the police officer in charge of the police station within the local limits of jurisdiction of which the domestic violence alleged to have been committed has taken place and to the service providers in that area.

(2) Upon a request of any aggrieved person, a service provider may record a domestic incident report in Form I and forward a copy thereof to the Magistrate and the Protection Officer having jurisdiction in the area where the domestic violence is alleged to have taken place.

6. Applications to the Magistrate.-

- (1) Every application of the aggrieved person under section 12 shall be in form II or as nearly as possible thereto.
- (2) An aggrieved person may seek the assistance of the Protection Officer in preparing her application under sub-rule (1) and forwarding the same to the concerned Magistrate.
- (3) In case the aggrieved person is illiterate, the Protection Officer shall read over the application and explain to her the contents thereof.
- (4) The affidavit to be filed under sub-section (2) of section 23 shall be filed in Form III.
- (5) The applications under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

7. Affidavit for obtaining ex-parte orders of Magistrate.-

Every affidavit for obtaining ex-parte order under sub-section (2) of section 23 shall be filed in Form III.

8. Duties and functions of Protection Officers.-

- (1) It shall be the duty of the Protection Officer -
 - (xii) to Provide all possible assistance to the aggrieved person and the children to ensure that the aggrieved person is not victimized or pressurized as a consequence of reporting the incidence of domestic violence;
- (2) In addition to the duties and functions assigned to a Protection officer under clauses (a) to (h) of sub-section 9, it shall be the duty of every Protection Officer-
 - (a) to protect the aggrieved persons from domestic violence, in accordance with the provisions of the Act and these rules;
 - (b) to take all reasonable measures to prevent recurrence of domestic violence against the aggrieved person, in accordance with the provisions of the Act and these rules.

9. Action to be taken in cases of emergency.- If the Protection Officer or a service provider receives reliable information through e-mail or a telephone call or the like either from the aggrieved person or from any person who has reason to believe that an act of domestic violence is being or is likely to be committed and in a such an emergency situation, the Protection Officer or the service provider, as the case may be, shall seek immediate assistance of the police who shall accompany the Protection Officer or the service provider, as the case may be, to the place of occurrence and record the domestic incident report and present the same to the Magistrate without any delay for seeking appropriate orders under the Act.”

5. This Court in *Bhupender Singh Mehra* (supra) has taken the view that on an application under Section 12 of D.V. Act, notice can be issued to the Respondent only after taking the domestic incident report, because the same would reflect as to against which of the Respondents, notice has to be issued, as to who was causing domestic violence, what was the nature of violence and when it was committed. According to this Court in *Bhupender Singh Mehra* (supra) the procedure adopted by the Learned Metropolitan Magistrate by issuing notice to the Respondent without considering the domestic incident report, without going through the contents of the application and without specifying as to why each of the Respondents was to be summoned is contrary to the Act. However, different High Courts have taken different views in the matter.

6. In *Ajay Kant & Ors. Vs. Alka Sharma*, 2008 Crl.L.J. 264 (M.P. HC) it was held:

“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.”

7. In *Rakesh Sachdeva & Ors. Vs. State of Jharkhand & Anr. 2011 Crl.L.J. 158 (Jharkhand HC)* it was held:

“12. It would thus appear that the proviso to Section 12 would impose that before passing any order on an application of the aggrieved person, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer. The order contemplated in the proviso relates to the final orders, which the Magistrate, may pass under Section 18 of the Act. The Protection orders, which the Magistrate may pass under Section 18 of the Act, is only on being prima facie satisfied that the domestic violence has taken place or is likely to take place. The insistence to take into consideration the domestic incident report of the Protection Officer would therefore, not apply at the stage of initiation of the enquiry under Section 12 of the Act. The contention of the petitioners that without considering the domestic incident report, the very initiation of the enquiry is bad, appears to be misconceived and therefore, not tenable.”

8. In *Md. Basit v. State of Assam (Criminal Petition No.175/2011 decided by Gauhati High Court on 9th June, 2011)*, it was held:-

“10. I partly agree and partly disagree with the views taken by the Hon’ble Madhya Pradesh High Court and Jharkhand High

Court. In my considered opinion, Section 12 does not deal with passing of final orders. Final orders are passed under Sections 18,19, 20, 21 and 22 of the Act only. Sec. 12 is akin to Sec 200 of the Criminal Procedure Code, 1973. Section 12 only contemplates as to who can file a complaint, what reliefs can be sought for, what should be the contents of the complaint and how the complaint can be examined thereafter. If these preconditions are satisfied the court can take cognizance of the complaint, subject to making out a prima facie case on facts. Unlike Sec. 200 CrPC there is no requirement of recording preliminary statement of the aggrieved person, filing a complaint under Sec. 12 of the DV Act, for the purpose of taking cognizance thereof.

11. Under Section 12(1) of the DV Act, an application/complainant can be filed before a Magistrate either by an aggrieved person or by a Protection Officer or any other person on behalf of the aggrieved person. In this way, Section 12(1) does not contemplate that such an application should invariably be accompanied by a report from a Protection Officer. Proviso to Section 12(1) is in the nature of a rider, which mandates that the Magistrate shall consider any domestic incident report, if received by him either from a Protection Officer or Service Provider. I have already mentioned earlier that an application under Section 12 can be independently filed by an aggrieved person, which may not be accompanied by any report from a Protection Officer. However, if any report from a Protection Officer is available before the Magistrate that shall have to be taken into consideration, but, the law does not impose a precondition for the Magistrate to call for a report from the Protection Officer. On this point I differ with the view taken by Hon'ble M.P. High Court, wherein it has been held that it is not obligatory for the Magistrate to consider the report. With the same analogy, I also differ with the view taken by the Hon'ble Jharkhand High Court wherein, it has been held that 'the insistence to take into consideration the domestic incident report of the Protection Officer would therefore, not apply at the stage of initiation of the enquiry under Section 12 of the Act'.

12. For aforesaid reasoning, I approve the view taken by the learned Sessions Judge that it is not obligatory for a Magistrate either to call for a report from a Protection Officer or a Service Provider at the stage of taking cognizance of the complaint. However, if any such report is available before the Magistrate, the same should be taken into consideration.”

9. A perusal of Section 12(1) D.V. Act permits any aggrieved person or a protection officer or any other person on behalf of the aggrieved person to present an application to the Magistrate seeking one or more reliefs under the Act. As per the proviso, 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. It may be noted that the very use of the word “any domestic incident report having been received” indicates that all cases where domestic incident report may be received, the same shall be considered. However, where no domestic incident report has been received, it is not mandatory for the Court to wait for the said report before issuing notice. Thus, the receipt of the domestic incident report is not a pre-requisite for issuing a notice to the Respondent. This position is further clarified from sub-Section (2) which says that the relief sought under Sub-Section (1) may include relief of issuance of an order of payment of compensation or damages without prejudice to the rights of such person to institute a suit for compensation for damages.

10. Further, under Section 23, D.V. Act the Magistrate has the power to pass such interim and ex-parte orders as he deems just and proper. The Magistrate is empowered to pass ex-parte orders on the basis of affidavits of the aggrieved person in such forms as may be prescribed under Section 18, 19, 20, 21 or as the case may be under Section 22 against the Respondent. A

perusal of Rule 4 & 5 of the D.V. Rules shows that the complainant is empowered to report the matter to the protection officer who on receipt of a complaint of domestic violence shall prepare a domestic incident report in Form-1 and submit the same to the Magistrate and forward copies thereof to the Police officer in-charge of the Police Station within the local limits of jurisdiction in which domestic violence alleged to have been committed, has taken place and to the service provider in that area. A conjoint reading of Section 12 & 23 of the D.V. Act shows that the insistence to take into consideration the domestic incident report of the protection officer would not apply at the stage of initiation of the enquiry under Section 12 of the D.V. Act, because the Magistrate on the basis of an application supported by affidavit on being satisfied can even grant ex-parte orders in favour of the aggrieved person under Sections 18, 19, 20, 21 or 22 as the case may be.

11. Since the view taken by this Court is contrary to the view expressed by the learned Single Judge of this Court in *Bhupinder Singh Mehra (supra)*, it would be appropriate that the issue whether calling and considering the report of the Protection Officer is mandatory before issuing notice to the Respondent in an application under Section 12 of the Protection of Woman from Domestic Violence Act, 2005 to be considered by Division Bench. Accordingly, the matter is referred to Hon'ble the Acting Chief Justice for being placed before the Division Bench for consideration.

(MUKTA GUPTA)
JUDGE

MARCH 05, 2012/‘ga’