

**A.F.R.**

**Court No. -67**

**Case :- APPLICATION U/S 482 No. - 7721 of 2023**

**Applicant :- Smt. Hasina Khatoon**

**Opposite Party :- State of U.P. and Another**

**Counsel for Applicant :- Akshaya Kumar**

**Counsel for Opposite Party :- G.A.**

**Hon'ble Rahul Chaturvedi,J.**

(1). Heard Shri Akshay Kumar, learned counsel for applicant and learned A.G.A. for the State of UP. Perused the record.

(2). Extraordinary powers of this Court is being invoked by the applicant u/s 482 Cr.P.C. to quash order dated 23.01.2023 passed by the Civil Judge (Junior Division)/F.T.C. (Crime against Women), Moradabad in Execution Case No.697 of 2022 (Smt. Hasina Khatoon vs. Ahmad @ Ramzani) u/s 31 of the Domestic Violence Act, 2005, arising out of Case No.10095 of 2017 (Hasina Khatoon vs. Ahmad Ali) u/s 12 of the Domestic Violence Act by which the court below has rejected the claim of applicant for maintenance amount of Rs.2.64 lacs on the ground that the opposite party no.2 has undergone an imprisonment of one month, and thus, the balance amount cannot be claimed from the opposite party no.2.

(3). Before coming to the actual legal aspect of the issue, it is imperative to spell out the bare skeleton facts of the case to appreciate the controversy in its correct perspective.

(a). The applicant Hasina Khatoon got married with opposite party no.2 on 23.5.1990 as per the Muslim rites, rituals and customs. This

couple was blessed with one son, unfortunately he was handicapped. It seems that there was deep rooted discord between the husband and wife on account of various factors, consequentially the opposite party no.2 kicked her out along with her handicapped son on 21.7.1995. Thus, a usual proceeding u/s 498A IPC and other allied sections was initiated against the opposite party no.2.

- (b) After some time, on account of intervention of certain well-meaning persons of the society and respectable members and with the help and aid of their relatives, better sense prevailed upon the opposite party no.2 thereafter a compromise deed was executed inter-se. As a consequence thereof, the applicant started living with opposite party no.2. After sometime, the applicant was again thrown out of with her handicapped son from her domestic unit on 20.5.2017 and since then she is residing in a rented accommodation along with her handicapped son in most pathetic condition, having no fixed source of income.
- (c). It is further contended by learned counsel for the applicant, that opposite party no.2 has sufficient source of income and by a rough estimate he is earning above Rs.50,000/- per month from various sources.
- (d) The applicant was not having any means of earning, wholly dependent upon her husband, who is still willfully ignoring her and her handicapped son, thus, she was running from pillar to post.

Under compelling circumstances, the applicant filed a proceeding under Section- 12 of the Domestic Violence Act having Case No.20095 of 2017 (Hasina Khatoon vs. Ahmad Ali) in the court of Additional Chief Judicial Magistrate-IV, Moradabad.

- (e) As the applicant was in dire need of money so as to make both the ends meet for herself and her handicapped son, and therefore, she moved yet another application under Section- 23 of the Domestic Violence Act, seeking an ex-parte interim order keeping in view the exigency of the circumstances.
- (f) After service of notice upon opposite party no.2, the opposite party no.2 has filed his objection denying the allegations made in the claim.
- (g) Having thrashed the material on record, the court below vide order dated 19.7.2019 allowed applicant's application for interim maintenance and directed opposite party no.2 to pay Rs.4,000/- to the applicant and Rs.4,000/- to his handicapped son, totalling Rs.8,000/- per month, payable on 10<sup>th</sup> day of every month.
- (h) Aggrieved by the aforesaid interim order dated 19.7.2019, opposite party no.2 preferred an appeal having Criminal Appeal No.41 of 2019 (Ahmad Ali @ Ramzani vs. State of U.P. and others), but the Additional Session Judge, Moradabad vide its order dated 01.4.2022 have rejected the appeal preferred by opposite party no.2.

- (i) Opposite party no.2, aggrieved by order dated 01.04.2022, again came to this Court by filing Crl. Misc. Application u/s 482 No.11881 of 2022 (Ahmad Ali @ Ramzani vs. State of U.P. and two others), but sensing the adverse observation of the Court, learned counsel for opposite party no.2 expressed his desire to enter into a compromise with the applicant and on this ground, without adverting anything on the merit of the case, aforesaid 482 application was dismissed on 02.11.2022.
- (j) Opposite party no.2 have exploited all the avenues available to him and resorted to gimmicks and chicanery so that he had not to pay single penny to the applicant, under the circumstances left with no other option, applicant Hasina Khatoon has moved an execution case for compliance of order dated 19.7.2019 passed by the court below and has prayed for issuance of recovery warrant against opposite party no.2 for recovery of totalling amount of Rs.2.64 lacs for the period of July, 2019 to April, 2022 after computing at the rate of Rs.8,000/- per month.
- (k) The court below on 29.9.2022 was pleased to pass a detailed order in Execution Case No.697 of 2022, whereby the recovery warrants were issued against opposite party no.2 Ahmad Ali @ Ramzani. Pursuant to aforesaid recovery warrant, when opposite party no.2 has failed to comply with the order, he was arrested by the police

and produced before the court below on 30.10.2022 in police custody and was sent to district jail Moradabad.

- (l) It was pleaded by learned counsel for the applicant that since opposite party no.2 declined to adhere to the directions of executing court and consequently he was sent behind the bars for 30 days vide order dated 21.11.2022. Order dated 21.11.2022 is being quoted hereunder :

“21.11.2022

आज विपक्षी अहमद अली उर्फ रमजानी पुत्र स्व० जुम्मा निवासी शाहपुर, मुबारकपुर उर्फ खोकसपुर थाना छजलैट जिला मुरादाबाद, को न्यायालय द्वारा जारी किए गए रिकवरी गिरफ्तारी वारंट मूल्य 2,64,000/- रुपये की वसूली हेतु दिनांक 30.10.2022 को रिमाण्ड मजिस्ट्रेट द्वारा जेल भेजा गया था। विपक्षी आज जेल से न्यायालय में उपस्थित आया। विपक्षी से न्यायालय द्वारा पूछा गया कि क्या वह उपरोक्त वर्णित धनराशि जमा करने के लिए तैयार है। विपक्षी द्वारा वर्णित संपूर्ण धनराशि जमा करने से इंकार किया गया। रिकवरी के सम्बन्ध में विपक्षी को 30 दिन की न्यायिक हिरासत में रखा जाना था परन्तु विपक्षी का धारा-309 सी०आर०पी०सी० का वारंट बन गया था। अतः धारा-309 सी०आर०पी०सी० का वारंट निरस्त किया जाता है। विपक्षी को 30 दिन की न्यायिक हिरासत में रखने हेतु आदेशित किया जाता है। अतः विपक्षी को दिनांक 30.11.2022 तक या उपरोक्त वर्णित धनराशि जमा करने तक सिविल कारागार में भेजा जाता है। वाद दीवानी प्रकृति का है।”

- (m) Thus, from the aforesaid order it is clear that the court has directed to send the opposite party no.2 to a civil prison for 30 days i.e. up to 30.11.2021 or till such time he deposits the outstanding maintenance amount. Thus, the underline idea to send opposite party no.2 in jail is to exert pressure upon him so that he may cough up the outstanding maintenance amount. In fact, this was a mode of

enforcement of the order and not a mode of satisfaction. The court was insisting that the opposite party no.2 must pay the outstanding maintenance amount.

(n) From the aforesaid, it is culled out that the stubborn opposite party no.2 did not budge a single inch to pay the outstanding maintenance amount, rather he preferred to go behind the bars.

(o) After expiry of 30 days, on 30.12.2022 opposite party no.2 was released from jail, even though, he has not bothered to pay the outstanding maintenance amount of Rs.2.64 lacs to the applicant. Under compelling circumstances, the applicant moved yet another application on 17.1.2023 before the court below for issuance of “fresh recovery warrants” against opposite party no.2. This application, contended by learned counsel for the applicant, was surprisingly partly rejected by the court concerned vide order dated 23.01.2023 and issued recovery warrant for the period of October, 2022 to January, 2023 only for a sum of Rs.32,000/-. Relevant portion of the impugned order dated 23.01.2023, is being reproduced herein below :-

*“सुना एवं पत्रावली का अवलोकन किया।*

*पत्रावली के अवलोकन से स्पष्ट है कि उक्त मुकदमें में न्यायालय द्वारा दिनांक 29.09.2022 को विपक्षी अहमद अली के विरुद्ध रिकवरी वारन्ट जारी किया था। दिनांक 30.10.2022 को वर्णित धनराशि जमा न करने के कारण विपक्षी को 30 दिन की न्यायिक हिरासत में भेजा गया था, जिसके सम्बन्ध में अभियुक्त एक माह कारावास में रह चुका है। धारा- 300 दं०प्र०सं० 1973 में उल्लिखित है कि यदि किसी अपराध में विपक्षी को दोषसिद्ध किया जा*

चुका है तो उसी अपराध के लिये दोबारा दोषसिद्ध घोषित नहीं किया जा सकता। मामले के तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए विपक्षी के विरुद्ध देय धनराशि माह अक्टूबर 2022 से माह जनवरी 2023 तक के लिये रिकवरी वारन्ट जारी किया जाना न्यायोचित प्रतीत होता है। अतः ऐसी स्थिति में इस स्तर पर आन्तरिम भरण पोषण धनराशि 2,64,000/- की वसूली हेतु प्रार्थना पत्र निरस्त किया जाता है तथा देय धनराशि माह अक्टूबर 2022 से माह जनवरी 2023 तक 32,000/- रु० की वसूली हेतु रिकवरी वारंट जारी किया जाता है। विपक्षी के विरुद्ध रिकवरी वारंट जारी हो। ”

(4). I have gone through the order impugned dated 23.01.2023 which indicates that the reasoning adopted by the court of F.T.C. (Crime Against Women), Moradabad is palpably myopic and puerile, inasmuch as, that the concerned court while passing impugned order has taken recourse of Section 300 of Cr.P.C., which speaks about the doctrine of “*autrefois convict and autrefois acquit*”. The essentials of the applicability of aforesaid Section 300 of Cr.P.C. are :

- (i) *That he (the accused person) had previously been tried by a court for an offence.*
- (ii) *That such Court was competent to try that offence.*
- (iii) *That he was either convicted or acquitted of that offence, at the former trial.*
- (iv) *That such conviction or acquittal still remains in force when a subsequent proceeding has been brought against him.*
- (v) *That at the subsequent proceeding he is being tried again-(a) for the same offence; or (b) on the same facts for any other offence for which a different charge might have been made under s. 221(1)-(2).*

(5). Now comparing aforementioned essentials with the reasoning given in the impugned order, indicates that the earlier part of the order for sending the opposite party no.2 in jail is not for any offence nor he was convicted for any offence. Since he was a defaulter in paying the outstanding maintenance amount, that is why, he has to face civil prison

so that he may pay the maintenance amount, and therefore, the reasoning adopted by the court concerned while passing impugned order is *per se* absurd and total non-application of correct law.

(6). Now coming to yet another aspect of the issue i.e. the application for execution under Section-31 of the Protection of Women from Domestic Violence Act, 2005 (Act No.43 of 2005). Before delving into this legal point, it is imperative to have a fleeting glance over the object of “The Protection of Women from Domestic Violence Act, 2005”. The OBJECT speaks that aforesaid Bill seeks to provide the following objects :

*“(i). It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.*

*(ii) It defines the expression “domestic violence” to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.*

*(iii). It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or*

*rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.*

*(iv). It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.*

*(v). It provides for appointment of Protection Officers and registration of non-governmental organisations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.”*

(7). Since the aforesaid application has been moved under Section-31 of the Protection of Women from Domestic Violence Act, as such, it is imperative to quote Sections 31 and 32 of this Act, which reads 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 Magistrates may also frame charges under section 498A 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.*

**32. Cognizance and proof.—**

*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence under sub-section (1) of section 31 shall be cognizable and non-bailable.*

*(2) Upon the sole testimony of the aggrieved person, the court may conclude that an offence under sub-section (1) of section 31 has been committed by the accused.”*

(8). The provisions of aforesaid sections speak about the penalty for breach of protection by the respondents. Thus, it is evident that the 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.

(9). On this score, it has been submitted that vide order dated 29.9.2022 while issuing the recovery warrant against opposite party no.2, the police on 30.10.2022 have arrested the opposite party no.2 and sent him to District Jail, Moradabad by passing an order mentioned above, whereby it has been mentioned that the applicant was directed to remain in jail up to 30.11.2022 or till the deposit of outstanding amount of Rs.2.64 lacs. It seems that the opposite party no.2 has preferred earlier one and served out his time up to 30.11.2022 (say about one month) in jail to allegedly absolve him from the liability of paying outstanding maintenance amount.

(10). In this regard it has been contended by learned counsel for the applicant that this was not an object of the Protection of Women from Domestic Violence Act. This in fact is social legislation in tenting the

wives and the children and levying the responsibility upon the shoulders of husbands to maintain their wives and children. Serving out in jail for month, would not absolve the opposite party no.2 from the liability of maintaining his wife and children. Sending a person into jail is a mode of deterrence so that he may clear off the outstanding maintenance amount and keep on paying regularly so that his wife and children may not die in a destitute condition. This is the precise underline idea which has been expatiated upon by the Hon'ble Apex Court in the case of **Smt. Kuldip Kaur vs. Surender Singh and another, 1989 SCC (1) 405.** The ratio laid down in this case may be usefully recalled and applied in the present case. Exercise of power under Section-31 of the Domestic Violence Act is a mode of enforcement of the alleged protection orders under Section-18 of the Act and it is distinguished from the mode of satisfaction and the liability which can only be made by means of the an actual payment. Relevant portion of the order in Smt. Kuldip Kaur (supra) is being quoted herein below :

*“A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a 'mode of enforcement'. It is not a 'mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance 'without sufficient cause' to comply with*

the order. It would indeed be strange to hold that a person who 'without reasonable cause' refuses to comply with the order of the Court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. The Parliament in its wisdom has not said so commence does not support such a construction. From where does the Court draw inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered.....”

(11). In yet another case of **Shantha @ Ushadevi & Anr vs. B.G. Shivananjappa, (2005) 4 SCC 468**, whereby it has been held that liability to pay the maintenance amount u/s 125 Cr.P.C. or in the instant enactment is in nature of continuing liability. The nature of right to receive the maintenance and the concomitant liability to pay goes hand in hand and it cannot be substituted by any civil imprisonment.

(12). In the case of **Poongodi & Anr vs. Thangavel, (2013) 10 SCC 618** it was held by the Hon'ble Apex Court that the proviso of Section 125(3) Cr.P.C. signifies that it is a mode of enforcement i.e. sending a defaulter to a civil prison and does not create any bar or affects the actual right of receiving maintenance amount from the said defaulter. It lays down the

procedure for recovery of maintenance from a defaulter and compel him to clear off the dues. Sending a defaulter to jail is not going to serve the object of Enactment. It would not going to absolve the defaulter from liability accrued upon him by way of his status as husband.

(13). Thus, taking into account the help from the aforesaid decisions of the Hon'ble Apex Court, this Court is of the considered opinion that the order impugned dated 23.01.2023 can't be sustained in the eyes of law and the F.T.C. Court while passing the impugned order has grossly erred by re-issuing the recovery warrant for the revised period i.e. from October, 2022 to January, 2023. A defaulter has to be dealt with an iron hand as per the provisions of Section 31 that any violation 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.

(14). This offence being non-bailable and cognizable, therefore, the court ought to have penalized the alleged defaulter for imposing the maximum punishment according to the guilt, where the opposite party no.2 has got remarried with some other lady and enjoying the life, leaving behind the applicant and her handicapped son on road. This is an unpardonable offence and a sin whereby the extra-ordinary punishment has to be levied mercilessly. The Magistrate ought to have proceeded against opposite party no.2 under Section -31 of the Protection of Women from Domestic

Violence Act and even if fails to recover the amount, he can put the immovable property to auction to recover the entire outstanding maintenance amount.

(15). Under these circumstances, I have no hesitation to say that the impugned order suffers from the vice of law mentioned above, and therefore, impugned order dated 23.01.2023 passed by the Civil Judge (J.D./F.T.C. (Crime against Women), Moradabad is hereby quashed, with the following direction :-

(i) The court below concerned will issue a fresh notice to the opposite party no.2 to the effect that he shall clear off the entire outstanding maintenance amount by 15.5.2023 pursuant to order dated 19.7.2019 i.e. from July, 2019 up to 30<sup>th</sup> April, 2023 @ Rs.4,000+4,000=Rs.8000/- per month by way of interim maintenance.

(ii) If the opposite party no.2 fails to deposit the entire outstanding amount of maintenance in this period, then the court concerned shall proceed against opposite party no.2 u/s 31 of the Protection of Women from Domestic Violence Act for penalizing him for imprisonment of one year and a fine of Rs.20,000/- or both.

(iii) Simultaneously, in case of failure to deposit the entire outstanding amount within time prescribed, the court concerned would attach the entire movable and immovable property belonging to the opposite party no.2 and the said property shall put to auction in order to recover the outstanding maintenance amount to be paid to the applicant.

(iv) Since the court concerned has only fixed the interim maintenance, the court concerned is expected to gear up the matter and decide the Case No.10095 of 2017 (Hasina Khtoon vs. Ahmad Ali) u/s 12 of Domestic Violence Act on priority basis and while calculating the final figure of maintenance amount, the court concerned shall adjust the interim maintenance amount given by the opposite party no.2 and shall be paid to the applicant.

16. The aforesaid directions must be adhered strictly within the time specified above and no laxity would be tolerated in compliance of the above directions.

17. With the above observations, this application u/s 482 Cr.P.C. is disposed off.

**Order Date :- 5.4.2023**

M. Kumar