

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 24.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

Crl.R.C.Nos.368 and 369 of 2018
and
Crl.M.P.Nos.4503, 4505 of 2018

MuralidharanPetitioner in both Crl.RC's

-Vs-

MutharasiRespondent in both Crl.RC's

Prayer in Crl.R.C.No.368 and 369 of 2018: These Criminal Revision Petitions are filed under Sections 397 read with Section 401 of Cr.P.C. praying to setting aside the Judgment dated 15.12.2017 passed by the Hon'ble XVIth Additional Sessions Judge, at Chennai, in Criminal Appeal No.77 & 78 of 2016, in confirming the order dated 05/03/2016 passed in Criminal M.P.No.2808 & 2811 of 2015 respectively in D.V.C.No.49 of 2015 on the file of the XVIth Metropolitan Magistrate Court, George Town at Chennai.

For Petitioner : Mr.R.Krishnaswamy
in both cases

For Respondent : Mr.C.V.Kumar
in both cases

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C O M M O N O R D E R

These Criminal Revision cases have been filed against the common order passed in Criminal Appeal Nos.77 and 78 of 2016 confirming the order passed by the trial Court in Crl.M.P.Nos.2808 and 2811 of 2015. Crl.R.C.No.368 of 2018 is directed against the order of the trial Court, directing the petitioner/husband to secure an alternative accommodation of the same level employed by the petitioner/husband in the matrimonial home and was further directed to pay the rent and other expenses required to procure such accommodation, which order by the trial Court has also been confirmed in the appeal by the lower

Appellate Court. The second revision case in Crl.R.C.No.369 of 2018 is directed against the payment of Rs.5000/- as interim maintenance to the respondent/wife, which has also been confirmed in the appeal by the lower Appellate Court.

2.The learned counsel appearing for the revision petitioner/husband would submit that the direction as given by the trial Court and as confirmed by the lower Appellate Court are contrary to the procedure contemplated under the Criminal Procedure Code and hence they are liable to be interfered with. The learned counsel would submit that without examining the revision petitioner/husband the directions have been issued by the trial Court and unfortunately the directions were also confirmed by the lower Appellate Court.

3.In support of his contention, the learned counsel would rely on the order passed by the Karnataka High Court in Crl.R.C.No.815 of 2009 dated 09.12.2009 (Krishna Murthy Nookula vs. Savitha). The learned counsel would draw the attention of this Court to paragraph Nos.15 to 19, which are extracted hereunder:

"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, 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 (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."

4. Admittedly, the revision petitioner/husband was not examined by the trial Court, while ordering the directions for securing accommodation and also for payment of interim maintenance pending disposal of the case in D.V.C.No.49 of 2015. He would therefore submit that the trial Court may be directed to follow the procedure as contemplated under Cr.P.C and to examine the revision petitioner/husband and other witnesses, if any, on his side and thereafter order the trial Court may be passed orders.

5. Per contra, the learned counsel appearing for the respondent/wife would submit that it was not an ex-parte order passed by the trial Court. The petitioner/husband has been granted sufficient opportunities and on behalf of the petitioner/husband, a counter affidavit has been filed resisting the claim of the respondent/wife. The learned counsel, in the course of arguments, would draw the attention of this Court to the order passed by the trial Court in which the trial Judge has given a finding that no witnesses were examined and no documents marked by either of the parties. In fact, the trial Court has observed as follows in the Judgment which are extracted hereunder:

".....On the contrary, the respondents have stoutly denied the allegations put forth by the petitioner, however the marriage between the petitioner and 1st respondent has been admitted. The respondents denies the allegation of impotency directed at the 1st respondent but alleges that the petitioner had not allowed the 1st respondent to have sex with her and that the 1st respondent has conducted potency test and given the test reports but still the petitioner was adamant

and not willing to live with the 1st respondent and that the petitioner had voluntarily left the matrimonial home on 17.05.2015. It is further stated that the petitioner is a MBA graduate in Tourism Management, that she is employed and earning a good salary and that the 1st respondent is the only bread winner of his family, that he has to take care of his aged parents as well as his sister and also meet out her marriage expenses. Further it is stated that since the petitioner never expressed her willingness to lead a peaceful marital life with this respondent. She is not entitled to accommodation with the respondents.

The point to be decided is whether the petitioner is entitled to residence order or alternative accommodation as prayed for. No witness were examined and no documents marked by either of the parties. Both side submissions heard and carefully considered...."

Therefore, the learned counsel for the respondent/wife would submit that the petitioner/husband was heard and his counter affidavit and submissions were also taken into consideration before passing the orders. The learned counsel would further submit that it is only an interim order granted by the trial Court as confirmed by the lower Appellate Court and therefore, no prejudice would be caused to the revision petitioner/husband, since, whatever objections he has, the same may be canvassed before the trial Court in the main case which is still pending.

6.This Court has considered the rival submissions and is in agreement with the submissions made on behalf of the respondent/wife.

7.Ultimately, this Court has to see whether an opportunity has been given to the petitioner/husband, while ordering interim protection and maintenance to the respondent/wife. In this case, as could be seen from the order passed by the trial Court sufficient opportunity was given to the revision petitioner/husband and on his behalf a counter affidavit has also been filed in the trial proceedings. The trial Court has also found that no witnesses were examined on behalf of the either parties. That being the case, it is not open to the petitioner/husband to contend that he was not given an opportunity before the order was passed by the trial Court.

8.Moreover, what is to be seen in such matters is whether

the trial Court has taken into consideration the relevant materials for passing the interim protection pending finalisation of the main case. In this case, admittedly, as the materials would disclose the trial Court has taken into consideration the relevant materials and also applied the legal principles on the subject matter and granted interim protection. The lower Appellate Court has rightly confirmed the order, since there was no infirmity in the order passed by the trial Court. Further this Court is in agreement with the submissions made on behalf of the learned counsel for the respondent/wife, the directions as such passed by the trial Court are interim in nature and therefore, the trial Court is not expected to conduct a full-fledged trial before such interim protection was ordered. This Court, in the circumstances of the case, is of the view that only after extending few opportunities to the revision petitioner/husband, the directions has been issued and the approach adopted by the trial Court was in consonance with the provisions of Cr.P.C and this Court does not find anything wrong in order to interfere with the interim directions passed by the trial Court as affirmed by the lower Appellate Court.

9. For the above said reasons, this Court does not find any merit in the revision petitions and the same are dismissed. Further, in order to give quietus to the issue as between the petitioner/husband and the respondent/wife, the trial Court is directed to dispose of the case in D.V.C.No.49 of 2015 pending on its file as expeditiously as possible and not later than six months. The revision petitioner/husband is also directed to pay arrears of maintenance within a period of four weeks from the date of receipt of a copy of this order and also directed to pay monthly maintenance as ordered by the Court below. The directions for payment of arrears and maintenance shall be subject to the result of the final outcome in the main case pending before the trial Court. Consequently, connected miscellaneous petitions are also dismissed.

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Assistant Registrar (CS-IV)

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Sub Assistant Registrar

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To

- 1.The XVII Additional Sessions Judge,
Chennai.
2. Do Thro The Principle Sessions Judge,
Chennai.
- 3.The XVI Metropolitan Magistrate Court,
George Town at Chennai.
4. do Thro The Chief Metropolitan Magistrate,
Egmore, Chennai.

+2cc to Mr. C.V.Kumar, Advocate, S.R.No. 5753, 5754

Crl.R.C.Nos.368 and 369 of 2018
and
Crl.M.P.Nos.4503, 4505 of 2018

GJ(CO)
GN(19/02/2019)



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