

(2018) 02 KL CK 0062
In the High Court Of Kerala
Case No : 684 of 2018

GOPINATH,?S/O.PADMANABHA MENON Vs STATE OF KERALA

Date of Decision : 07-02-2018

Acts Referred:

Protection of Women From Domestic Violence Act, 2005, Section 23, Section 29, Section 23(2), Section 18(2) - Power to grant interim and exparte orders. -

Citation : (2018) 02 KL CK 0062

Hon'ble Judges : Sunil Thomas

Bench : Single Bench

Advocate : A.T.ANILKUMAR,?V.SHYLAJA, M.PREMCHAND, M K PUSHPALATHA

Judgement

1. Petitioner herein is the respondent in M.C.No.23 of 2015, now pending before the Judicial First Class Magistrate-III, Thrissur, initiated by the second respondent herein. She sought a compensation of Rs.1 Crore from the petitioner herein under section 23(2) of the Protection of Women from Domestic Violence Act. After the marriage of the petitioner herein with her, a child was born. It was alleged by her that, she was abused and harassed by the petitioner herein. As a sequel to the family dispute, the present complaint was laid. Along with the M.C, C.M.P.No.408 of 2015 was filed seeking attachment of Annexure-B schedule properties which included two items of immovable properties and FDs in various banks totalling to Rs.22,51,378/-.

2. After the appearance of the petitioner herein, he moved Crl.M.P.No.5076 of 2017 in M.C.No.23 of 2015 with a prayer to release a sum of Rs.10,00,000/- from attachment and to substitute another item of property as security for the amount sought to be released. He stated that, he is

the owner in possession of Ares of 364 in survey number 151/2, property of 6.07 ares in survey No.154 and another item having 3.84 Ares in

survey No.152 in Mukundapuram taluk. He sought for receiving the above properties as security and for releasing the above amount. It was

vehemently opposed by the second respondent herein contending that, if the attachment is lifted and the amount is released, that will cause serious

prejudice to the second respondent herein. Considering the strong objection raised by the second respondent, court below refused to vacate the

order and dismissed the application. This is under challenge in this proceeding.

3. The learned counsel for the second respondent, Mr.Premchand, objecting to the very sustainability of the Crl.M.C contended that the impugned

order is successful to an appeal under Section 29 of the DV Act and consequently, the Crl.M.C is not sustainable. It was further contended that

Section 29 implies the word ""the order includes any order passed by the court below under Sections 18(2) & 23 of the Act"". Consequently, this,

being an application under Section 23 of the Act, is appealable and hence the Crl.M.C is not sustainable. On merits, learned counsel contended

that the property is not burdened with the decree that may be ultimately passed. It was also contended that, there is no guarantee that the property

is not already encumbered or that, it is not likely to be alienated and is not sufficient to satisfy the decree amount. Learned counsel, to substantiate

the scope of Section 29 of the Act, relied on the decision of this court in Sulochana and Another V. Kuttappan and Others [2007(1) KHC 1071],

wherein, this court held that, an appeal is maintainable under Section 29 of the Act against an interim ex parte order passed under Section 23 of

the Act. Explaining the contentions, it was held by this court in paragraph 14 that, purely interlocutory orders which deal only with procedural and

which do not affect the rights of the parties will certainly not fall within the sweep of expression "the order" in Section 29. Each and every order

under Chapter 4 of the Act may not fall within the sweep of expression ""the order"" in Section 29 of the Act. The order has to affect or have a

material reflection on the rights of the parties in order that such orders would be appealable.

4. The above quoted decision refers to a case, wherein, an interim ex parte order was challenged in appeal. It was opposed by the opposite side

contending that the appeal is not sustainable since the aggrieved person can move the court below and seek for appropriate further orders. It was

in that context, the court held that the power under Section 29 of the Act is vital in taking several of the orders passed under Chapter V. In the

case at hand, the situation appears to be different. The *ex parte* order passed by the court below is not challenged by the petitioner herein. They

have only sought for release of a portion of the security attached by the court below. That application was refused. I doubt whether it is an order

which will fall within the scope of section 29 of the DV Act. Consequently I feel that the Crl.M.C is sustainable.

5. Regarding the contention of the learned counsel for the petitioner on merits whether the property is encumbered and whether further

encumbrance over the property cannot be restricted, I feel that the above application can be allied by directing the petitioner herein to produce the

encumbrance certificate and also a valuation certificate of the property to show its approximate value. Having considered these facts, court below

shall pass appropriate orders.

6. As mentioned above, claim is for an unquantified amount as compensation. Her right to claim compensation and if so, the quantum, can only be

determined after a full fledged trial. Substantial immovable properties have already been attached including the FDs, totalling to about 22 lakhs.

Definitely, money cannot be a substitute for immovable property. Petitioner herein has offered valuable security in place of that. The Court doubted

whether the property is free from attachment and encumbrance.

7. Having regard to the fact that substantial property and FD are already in deposit, release of a portion of the deposit will not cause any prejudice

to the petitioner herein. This especially so, since it may take long time for the final determination of the case. The apprehension raised by the Court

can be allied by insisting for production of an encumbrance certificate. Having considered these facts, I am inclined to set aside the impugned order

and to direct the court below to accept the properties mentioned in the petition as valuable security and release of Rs.10,00,000/- as sought for.

Petitioner herein is directed to file an affidavit stating that the property is offered as security for the decree that may be passed in the case. He shall

also produce an encumbrance certificate, if not already produced. For

verification, petitioner herein shall produce the original title deeds, which shall be returned after comparing, the copies of the documents to be retained in Court. Crl.M.C is disposed of as above.