

(2014) 07 J&K CK 0037

In the Jammu And Kashmir High Court

Case No : 561-A No. 356 Of 2013 and CMA No. 434 Of 2013

Vinay Sharma and Others

APPELLANT

Vs

Shweta Sharma and Others

RESPONDENT

Date of Decision : 11-07-2014

Acts Referred:

Citation : (2014) 4 JKJ 347

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Advocate : S.K. Shukla and Dhiraj Choudhary, Advocates for the Appellant; L.K. Sharma and N.P. Kotwal, Advocates for the Respondent

Judgement

Tashi Rabstan, J.—Petitioners through the medium of petition under Section 561-A Cr.P.C. are seeking quashment of complaints titled

Shweta Sharma and others v. Vinay Sharma and others filed under Sections 12 and 23 of the Protection of Women from Domestic Violence Act,

2010 pending before learned Chief Judicial Magistrate, Jammu, and order dated 12.10.2013 by virtue of which they have been directed to pay an

amount of Rs. 10,000/- per month to the respondents (petitioners herein) as an interim maintenance to the respondents-complaints on the grounds

taken in it. It is contended that relationship between petitioner No. 1 and respondent No. 1 as husband and wife remained cordial for sometime.

Thereafter, respondent No. 1 started harassing the petitioners on petty issues at the instigation of her parents. It is also contended that things

became worst when petitioner No. 1 objected respondent No. 1's telephonic conversation with some unwanted persons and that too for long

duration due to which petitioner No. 1 became depressed and started taking alcohol. Petitioner No. 1 was forced by respondent No. 1 and her

parents to live separately from his parents and started living in a rented accommodation. Thereafter, respondent No. 1 filed complaints against

petitioners and dragged them to the Women Cell. It is also contended that respondent No. 1 though was posted as Supervisor in the Social

Welfare Department, J&K Government, yet petitioner No. 1 used to give Rs. 10,000/- to her despite the fact that she had deserted the company

of petitioner No. 1 more than three years ago. Respondent No. 1 even did not allow petitioner No. 1 to meet her daughters. It is also contended

that at one point of time, elders of both the families sat together for an amicable solution, but, respondent No. 1's family demanded Rs. 30.00 lac

for ending the marriage of the parties. Respondent No. 1 in order to extract money from him filed a Petition under Sections 12 and 23 of the

Protection of Women from Domestic Violence Act before learned Chief Judicial Magistrate, Jammu. On this, learned trial Court, vide order dated

12.10.2013 has ordered, in ex parte, to pay an amount of Rs. 10,000/- per month to the complainants-respondents herein.

2. It is vehemently argued by learned counsel for the petitioners that the complaints as well as order dated 12.10.2013 are not sustainable in the

eyes of law as learned trial Court has not taken into consideration any domestic incident/report in terms of Section 12 of the Act of 2010 and also

the affidavit have not been filed as per the provisions of the Act. Moreover, respondent No. 1 in her complaints had admitted in para No. 12 that

petitioners 2 and 3 are living separately from them and do not constitute a joint family any more, for the last more than 4 years, so they should not

have been arrayed as party respondents in the complaint filed under Sections 12 and 23 of the Protection of Women from Domestic Violence Act.

3. On the other hand, learned counsel for the respondents contended that there was no jurisdictional error in taking cognizance of the complaint

under Section 12 of the J&K Protection of Women from Domestic Violence Act or granting interim relief under Section 23 of the said Act. Since

there is an alternative remedy of appeal under Section 29, as such, present petition is not maintainable.

4. Heard learned counsel for the parties and perused the record.

5. It is admitted case of the parties that both petitioner No. 1 and respondent No. 1 were living as husband and wife and their relations remained

cordial for some time.

6. Learned counsel for the petitioner while arguing submitted that the Magistrate has not taken the cognizance of the matter as per Section 12 of

the Jammu and Kashmir Protection of Women from Domestic Violence Act, 2010. As per the proviso of Sub-section (1) of the Section 12 of the

Act of 2010, the Magistrate can take cognizance of the complaint only after taking into consideration of the domestic incident/report received by

him from the 'Protection Officer' or the 'Service Provider'.

7. It is profitable to reproduce proviso attached to Sub-section (1) of Section 12 of Jammu and Kashmir Protection of Women from Domestic

Violence Act, 2010 as under:--

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.

8. A plain reading of the aforesaid proviso would reveal that the Magistrate concerned before passing any order in the matter shall take into

consideration the domestic/incident report, but the learned trial Court has overlooked this legal aspect of the matter and passed the orders in

contravention of the said proviso.

9. So far as ""domestic relationship"" is concerned, it is defined in clause (f) of the Section 2 of the Act of 2010 and the same reads as under:--

Domestic relationship means a relationship between two persons, who live or have, at any point of time, lived together in a shared household,

when they are related by consanguinity, marriage, adoption or are family members living together as a joint family.

10. The aforesaid clause defines the domestic relation as family members living together as a joint family. In the instant case, petitioner No. 1 and

respondent No. 1 were then disowned by petitioners No. 2 and 3 orally in the year 2009 and thereafter a Disinheritance Deed was also executed

by them before the competent authority because of the conduct of respondent No. 1 and they got separated from them in the same year and as

such they now do not constitute a joint family rather they constitute a nuclear family, which fact has already been admitted by respondent No. 1 in

para No. 12 of the complaint, so the learned trial Court without appreciating the provisions of clause (f) has taken the cognizance against all.

11. Learned counsel for the petitioners while seeking quashment of order impugned has also placed reliance on Rule 7 of the Jammu and Kashmir

Protection of Women from Domestic Violence Rules, 2011 which would provide that every affidavit for obtaining ex parte order under Sub

Section 2 of Section 23 of the Act of 2010, shall be in Form III, but, in the instant case affidavit has not been drafted and sworn as per Form III.

However, learned counsel for the respondents contended that technical objections regarding proforma of affidavit cannot defeat the substantial

justice to be done which cannot be sacrificed at the alter of technicalities.

12. This Court is not inclined to accept this contention of learned counsel for the respondents on the ground that if a Statute or Rule prescribes that

a thing be done in a particular manner then the same should be done in that particular manner otherwise the same makes it non-est in the eyes of

law. Rule 7 provides that every affidavit for obtaining ex-parte order under Sub Section 2 of Section 23 of the Act of 2010 shall be in Form III.

13. It is profitable to reproduce Section 23(2) of the Act 2010 as under:--

if the Magistrate is satisfied that an application prima facie discloses that respondent is committing or has committed an act of domestic violence or

that there is likelihood that respondent may commit any act of domestic violence, he may grant an ex-parte order on the basis of affidavit in such

form as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or Section 22, as the case may, against

the respondent.

14. Procedure in this regard has been prescribed in Section 28 of the Act.

15. It is profitable to reproduce Sub Section 1 of Section 28 of the Act as under:--

(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be

governed by the provisions of the Code of Criminal Procedure, Samvat 1989.

16. Learned trial Court has passed the order by overlooking the Act and Rules on the subject and without recording its judicial satisfaction.

17. The operative portion of order passed by the trial Court is reproduced as under:--

On perusal of the application and the affidavit, this court is satisfied that prima facie domestic violence has taken place and the complainant is

entitled to ad-interim maintenance. It is ordered that subject to objections from the other side, the respondent No. 1 shall pay a monthly interim

maintenance of Rs. 4000/- to the complainant No. 1 and Rs. 3000/- each to complainant No. 2 and 3 (in total Rs. 10,000/-).

18. Learned trial Court has not recorded its judicial satisfaction while granting interim compensation to the respondents as there was no material on record before it to record its satisfaction.

19. On 26.05.2014, after arguing for a while, learned counsel for respondent, Mr. Sharma stated that interim order passed by the trial Court is on

the basis of the statement of the respondents recorded by the trial Court. However, when he was pointedly asked as to whether the learned trial

Court has referred to the statement of respondents in the order impugned or there is any reference of it in the objections filed by him, he fairly

stated that it might not have been mentioned.

20. In the said circumstances, this Court felt it necessary to examine the trial Court's record and directed the Registry to summon the same.

Accordingly, record was summoned and the same is attached with the File.

21. This Court has gone through the record and after going through the same it seems that order impugned dated 12.10.2013 has been passed

without recording the statements of the complainants and the witnesses. Even the affidavit filed in support of the application for interim relief was

also not in pursuance of Rule 7 of the Act supra wherein it is provided that every affidavit for obtaining ex-party order under Sub Section 2 of

Section 23 of the Act shall be filed in Form-III, which has not been complied with in the instant case. However, learned counsel for the respondents

submits that Form has been prescribed in the Rules only to facilitate filing of complaint so that it may contain all necessary particulars for decision of

the case. He also argued that affidavit filed by the respondents is even otherwise strictly as per the provisions as prescribed under Rule.

22. In the present case trial Court has passed ex parte interim order, which is against the mandate of Rule as the same has been passed without

recording the statements of the complainants and the witnesses. Moreover, the affidavit filed along with application for interim relief was also not in

pursuance of Rule 7 of Jammu and Kashmir Protection of Women from Domestic Violence Rules, 2011. In this regard, it is pertinent to take

Notice of the rational behind this particular Format of Affidavit, So, on reading the prescribed language of the Affidavit, one can notice the purpose and its legal aspect of each and every column which seems to be drafted by the Legislature with a defined purpose to make the deponent a cautious, a careful and responsible to fill up each and every column on the basis of which, the Magistrate can take it even as the solemn statement of the Applicant. The order impugned is, therefore, not supported by any material and passed without application of mind. Therefore, both the judgments relied upon by learned counsel for the respondents are of no help and are distinguishable on facts. Even ex-parte orders, wherever permissible, are not to be passed in mechanical and perfunctory manner, as has been done in the instant case. So far as defect of filing of affidavit in support of application under Section 12 of the Act and the application for interim relief in prescribed form is concerned, the same is curable and the petitioner is at liberty to remove the same.

23. In view of the aforesaid discussions, this petition is allowed. Order impugned dated 12.10.2013 passed by the learned trial Court is quashed.

Respondents are however, at liberty to approach the trial Court afresh by filing requisite affidavit as required in terms of Rule 7 supra. If needful is done by the respondents, the matter shall be considered and disposed of by the Magistrate strictly in terms of the Rules occupying the field.

However, the amount deposited before this Court and subsequently released in terms of order dated 12.03.2014 shall not be recovered from the respondents. Nonetheless, any observation made hereinabove for the disposal of this petition shall not be taken as expression of opinion on merits of the case. Disposed of as above along with connected CMA(s).