

GAHC010045452020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./86/2020

MONJIT TALUKDAR
S/O SRI GANESH TALUKDAR, R/O VILL-TITKAGORIA, MOUZA-HARIHO,
P.S.-PATACHARKUCHI, DIST-BARPETA, ASSAM

VERSUS

SMTI RITA TALUKDAR AND ANR.
W/O MANJIT TALUKDAR, PRESENT ADD-DHANANJAY KAKATI, VILL-
DUMURIA, P.S.-PATACHARKUCHI, P.O.-BHOUKAMARI, DIST-BARPETA,
ASSAM

2:THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR
ASSA

Advocate for the Petitioner : MR. S BORA

Advocate for the Respondent : PP, ASSAM

:: BEFORE ::

HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

Date of hearing & date

of Judgment : 10.12.2021.

JUDGEMENT AND ORDER (ORAL)

Heard Mr. S. Bora, learned counsel appearing for the revision petitioner. Also heard Mr. M. Kalita, learned counsel representing the respondent.

2. The instant petition has been filed under Section 397/401/482 of the CrPC, challenging the impugned order dated 02.01.2020, passed by the learned Sub-Divisional Judicial Magistrate (M), Bajali at Pathsala, in C.R. Case No.57/2019, whereby the petitioner/husband has been directed to pay interim maintenance of Rs.2500/- per month to the respondent/wife, contending that the aforesaid order is bad in law for violation of Section 8/9/12(1) of the *Protection of Women from Domestic Violence Act, 2005* without the domestic incident report (in short, DIR) before passing any order and same is liable to be quashed and set aside.

3. Backdrop of the case is that respondent entered into marriage with the petitioner on 13.12.2015 and out of their wedlock, a child was born on 16.11.2016. The respondent/ wife filed a petition under Section 12 of the *Protection of Women from Domestic Violence Act, 2005* (hereinafter referred to as the D.V. Act) read with Section 20/22/23 of the Act contending that soon after their marriage, her husband along with her in-laws used to torture her mentally and physically on minor issues. She was taunted on each and every aspect that she cannot use the household article, like motor pump to run washing machine, gas stove to prepare food and using of fan etc. etc. that she has not brought anything as *stridhan* and she has to arrange them from her parents. Many times, her mother and brother had to interfere into their family affairs to settle the matter but it was not helpful and her husband and in-laws used to torture mentally and physically on each and every occasion. She was not taken to hospital while she was suffering from some sort of ailments. Her husband even poured kerosene oil upon her on 09.05.2019 from which she luckily escaped. After the said incident, she left for her parental house along with her son and started living with her parents. Mentioning all details of the incidents, that her life is not safe at her husband's house, she filed the aforesaid petition before the court praying for various reliefs and protection under the DV Act including the maintenance as well as compensation for her and her minor child

along with a prayer for interim maintenance.

4. The petitioner herein filed the written statement after their appearance denying the allegations, contending that respondent/wife herself has left the matrimonial house at her own will and he is still willing to accept her and in the meantime on the basis of the petition filed by the respondent wife under Section 23 of the DV Act for interim relief, the court passed the impugned order dated 02.01.2020, the relevant portion of the order is extracted below:

“It is already seen that there are allegations and counter allegations by both the parties which are needed to be proved by supporting evidence adduced by the parties.

The undisputed fact available on record is that the aggrieved person and the respondents are in a domestic relationship and presently the aggrieved person is not living with the respondents. Thus, from the materials available on record, I am prima facie satisfied that the aggrieved person is a victim of domestic violence and as such I am of the considered opinion that it would be just and proper to grant monetary relief to the aggrieved person at this stage which will meet the need of her day to day expenses including the expenses of their minor child. Accordingly, the respondent no.1 namely Manjit Talukdar is directed to pay Rs.2,500/- (Rupees Two Thousand Five hundred) per month to the aggrieved person as interim monetary relief till disposal of this instant case.

The petition for interim relief to the aggrieved person is disposed of accordingly.”

5. Challenging the aforesaid order, the petitioner/husband of the respondent is before this Court as aforesaid.

6. The prime contention raised in the present petition about violation of Section 12(1) of the D.V. Act. It is argued that before passing an order on an application under Section 12 of D.V. Act, the Magistrate has to appoint Protection Officer and call for a domestic incident report from the Protection Officer as envisaged under Section 12(1) of the Act, and for non-application of the same, the impugned order is bad in law. It has been submitted that Section 8 and 9 of the Act specifically provided for appointing protection officer who has to furnish domestic incident report to the Magistrate and such report is required to be considered by the

Magistrate prior to passing any order.

7. In support of the case, the petitioner has relied upon the following decisions:

- (1) CrI. M.C. No.1766/2010 (Bhupender Singh Mehra vs. State of NCT of Delhi & Anr.) and
- (2) CrI. M.C. No.1773/2010 (Diwan Singh Mehra vs. State of NCT of Delhi & Anr.)
- (2) CrI. R.C.(MD) Nos.1133 of 2008 and 400 of 2009 and M.P.(MD) No.2 of 2010 (1. Murugan 2. Meenakshi 3. Pitchai 4. Lakshmi vs. Kasimani; Kasimani vs. 1. Murugan 2. Meenakshi 3. Pitchai 4. Lakshmi)

In the aforesaid decisions *Bhupender Singh and Diwan Singh* (supra), it has been held that as per the provision under Section 12 of the DV Act, before passing an order on an application, the Magistrate has to take into consideration, domestic incident report from the protection officer or service provider. Further, it has been held that an application under Section 12 of DV Act has to be treated in accordance with the provision under the Domestic Violence Act. The court should not exercise its jurisdiction without considering domestic incident report since it is necessary for the court to know before issuing any notice to the respondent as to who was the respondent, who caused domestic violence and what was the nature of violence and when it was committed.

8. In case of *Murugan* (supra), similarly it is held that order of Magistrate granting maintenance without taking into consideration and without dealing with the report filed by the protection officer, vitiates the provision under Section 12(1) of the DV Act.

9. In both above-referred cases, DIR report was available before the court and it was not taken into consideration by the court while passing the order. But in the present case, admittedly there was no DIR report before the court.

10. Vehemently opposing the prayer made by the petitioner's side, the learned counsel for the respondent has submitted that it is not mandatory for a Magistrate to obtain a DIR report before passing a maintenance order under the DV Act, as the Act nowhere provided that aggrieved person first has to make a complaint to the protection officer and then to the Magistrate concerned. By virtue of the language in Section 12 of the DV Act that the Magistrate shall consider the DIR report at the time of passing the order does not denude the power of the Magistrate to pass a maintenance order. Thus, it is contended that it is not obligatory on the part of the Magistrate to call for a DIR report before taking cognizance or passing an order of issuing notice.

11. In support of the contention, the respondent has relied upon the following decisions:

- (1) 2011 (5) GLT 356 [Basit (MD.) and Anr. vs. State of Assam and Ors.];
- (2) (2011) 4 GLR 276 (Abhiram Gogoi vs. Rashmi Rekha Gogoi);
- (3) CrI. M.C. 3083/2011 & CrI. M.A. 10914/2011 (Shambhu Singh vs. Manjari) and
- (4) CRMC No.274/2016, IA Nos.01/2017, 01/2016 (Ajay Kaul and Ors. vs. State of J&K and Ors.)

12. I have considered the rival submission of both the parties and also gone through the documents on record.

13. Let us appreciate the provision pertaining to Section 12 of the DV Act, which reads as below:

“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."

Chapter IV of the DV Act pertains to the procedure as to be followed by the Magistrate to grant relief to an aggrieved person. Under Section 12 of the DV Act, an application has to be presented by an aggrieved person, either by the person herself or a Protection Officer or any other person on behalf of the aggrieved person to the Magistrate, seeking relief as provided under the DV Act. A proviso has been added to Section 12(1) of the Act, that before passing any such order on any application received, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the Service Provider. Section 8 provides for appointment of Protection Officer by State in every district, whereas Section 9 of the DV Act provides the duties of the Protection Officer."

14. In *Basit (Md.) (supra)*, this court held 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.

While dealing with the aforesaid provision in *Abhiram Gogoi (supra)*, it has been held that the question as to whether a Magistrate can pass an order under Section 12 without DIR report having been received from a Protection Officer can well be answered by referring to Section 9(1)(b) as it makes abundantly clear that it is the duty of the Protection Officer to make a DIR report to the Magistrate upon receipt of a complaint of the domestic violence and forward the copy thereof to the police officer having jurisdiction, which shows that the DIR report comes into existence only when a complaint for domestic violence is received by a Protection Officer. If no such complaint is received by the Protection Officer, the question submitting a DIR report does not arise. The provision of the Act nowhere obliges the aggrieved party first to make a complaint to the Protection Officer and then to concerned Magistrate. There is no bar on the part of the aggrieved person to directly make an application under Section 12 of the DV Act seeking maintenance.

Similar principle is followed in *Shambhu Prasad Singh (supra)*, wherein it is also held that since an ex-parte interim order may be granted immediately upon institution of the complaint, it is likely that the Protection officer's DIR may not be prepared by then. Thus, the Magistrate is definitely empowered to exercise this power, and pass interim order(s) against the concerned respondent. If this can be done without considering the DIR, then certainly notice to the respondent must also be allowed to be served without first considering the DIR.

13. It is noteworthy that [Section 12\(1\)](#) does not mandate that an application seeking relief under the Act be accompanied with the DIR or even that it should be moved by a Protection officer. Even Rule 6 which stipulates the form and manner of making an application to the Magistrate does not require that the DIR must accompany an application for relief made under [Section 12](#). It is only the proviso to [section 12\(1\)](#) which mandates that the Magistrate shall consider the DIR "received by him from the Protection Officer or the service

provider". No obligation to call for the DIR has been imposed upon the Magistrate. The plenitude of the power under [Section 12](#), to pass appropriate orders, upon the application by "an aggrieved person" i.e. the victim of domestic violence is thus emphasized. A unique feature which the Court has to keep in mind is that the opening phrase in [Section 12](#) are wide ("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..." If Parliament had intended that a report of the Protection Officer is a pre-condition for the magistrate to act upon the complaint of an aggrieved person, or someone acting on her behalf, it would have expressed that intention more clearly. The Court instead, is circuitously asked to interpret that provision, in the light of a Proviso, which is contextual, rather than compulsive.

Another decision in *Ajay Kaul* (supra), acknowledges the above ratio that the proviso added to [Section 12\(1\)](#) of the DV Act is only to the effect that in case a domestic incident report has been received by the Magistrate, the same shall be considered before passing any order on an application received. [Section 12](#) of the DV Act per se does not hold that a Magistrate on receipt of complaint is obligated to call for a domestic incident report, before passing any order on an application. So it is not mandatory for a Magistrate to obtain a domestic incident report before the Magistrate passes any order provided under various section of Act; so receipt of domestic incident report is not a pre-requisite for issuing a notice to the respondent. 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 of the [DV Act](#)."

15. After going through the relevant provisions of the DV Act, and citations relied by both the parties, it reveals that the DIR report come into existence only when a complaint of domestic violence is received by Protection Officer. If no such complaint is received by Protection Officer, the question of submitting a DIR report does not arise. On the other hand, an application under Section 12 of D.V. Act can independently filed by an aggrieved person, which may not be accompanied by any report from a Protection Officer. However, if

any report any from a Protection Officer is available before the Magistrate that shall have to be taken into consideration, and the law does not impose precondition for the Magistrate to call for a report from the Protection Officer prior to passing an order. It is not obligatory for a Magistrate to call for a Domestic Incident Report at the stage of taking cognizance of complaint.

16. Where no DIR has been received, it is not mandatory for the court to wait for the said report before issuing notice. Further u/s 23 of the DV Act, the Magistrate has the power to pass such interim and ex-parte orders as he deem just and proper. On a conjoint reading of [Sections 9](#) and [12](#) of the DV Act it is manifestly clear that it is duty of the Protection Officer to work under the control and supervision of the Magistrate and to perform duties imposed upon him by the Magistrate and in case, he has received a complaint on domestic violence then, to make a domestic incident report and submit it to the Magistrate, as well as to forward copies of the complaint to the Police Officer in charge of the police station within local limits of whose jurisdiction, domestic violence is alleged to have been committed. The proviso added to [Section 12\(1\)](#) of the DV Act is only to the effect that in case a domestic incident report has been received by the Magistrate, the same shall be considered before passing any order on an application received.

17. Section 12 *per se* does not provide that Magistrate on receipt of complaint is under an obligation, to call for a DIR before passing any order on an application. It is not mandatory for a Magistrate to obtain a DIR before the Magistrate passes any order provided under various sections of the Act; receipt of DIR is not a pre-requisite for issuing a notice to the respondent.

18. The proviso to Section 12(1) only stipulates that the Magistrate shall take into consideration any domestic incident report received by him from Protection Officer or the Service Provider, whereas admittedly in the instant case, no DIR was received by the learned Magistrate as petition was filed directly to the court and as such question of non-consideration of such report does not arise. That apart it is noted the respondent wife while

filing the application already prayed for interim maintenance and subsequently she filed another petition under Section 23 of the DV Act praying for such interim relief again. By that time, the petitioner filed their written statement and after considering the pleadings between the parties as well as hearing both the sides, the impugned order has been passed. The court cannot lose sight of the fact that the respondent wife admittedly have no source of income of her own and she has a child to maintain and in such a scenario, it was incumbent on the part of the court to provide interim maintenance to the respondent/wife for their bare subsistence. Such petition was also supported by an affidavit with prayer for maintenance and waiting for any DIR without considering the prayer for interim maintenance would frustrate the very object of the fact.

19. The only contention that has been raised by the petitioner that there is no authenticity in the petition filed by his wife and he is still willing to lead the conjugal life but to be fair enough such mere assertion will not support the subsistence of two persons which is not actuated in letter and spirit. The entirety of the matter regarding allegation and counter allegation is to be adjudicated in course of trial on the basis of the evidence to be adduced by both the parties but amidst all, one has to survive, is the vital consideration. In the considered opinion of this court, the learned trial court has decided the matter in proper perspective in law, which call for no interference.

20. Under the provision of the Section 29 of the Act, appeal lies against any order passed by the trial court but without preferring the appeal, the petitioner has sought for quashing of the order after the pleadings between the parties is over. Such a casual approach is nothing but to frustrate the beneficial provision of the Act to debar the respondent/wife to get the benefit under the law.

21. The provision under Section 482 CrPC can be invoked in rare and exceptional circumstances but not to debar a lawful proceeding.

22. In view of the foregoing discussions, the petition in hand is hereby dismissed being

devoid of merit, however, it is made clear that any observation made by this court shall not have affect the merit of the case.

23. The interim order passed earlier stands vacated with a direction to the petitioner to pay the interim maintenance along with the arrear before the trial court, with a liberty to file an application to pay the arrear by way of installment if so advised.

JUDGE

Comparing Assistant