

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 18TH DAY OF JUNE 2018 / 28TH JYAISHTA, 1940

Cr1.MC.No. 6784 of 2017

(AGAINST THE ORDER IN CMP NO.7085/2016 IN MC NO.65/2017 OF JFCMC I, VARKALA)

PETITIONER(S)/RESPONDENT 3 & 2

- 1 ANSARI,  
AGED 64 YEARS, S/O.MUHAMMED YUSEF, SAIBER VILLA,  
NEAR PRESS MUKKU, EDAVA VILLAGE, EDAVA DESOM,  
KOLLAM DISTRICT.
- 2 REMLATH,  
AGED 50 YEARS, W/O.ANSARI, SAIBER VILLA,  
NEAR PRESS MUKKU, EDAVA VILLAGE, EDAVA DESOM,  
KOLLAM DISTRICT.

BY ADVS.SRI.M.T.SURESHKUMAR  
SRI.R.RENJITH

RESPONDENT(S)/PETITIONER/1ST RESPONDENT & STATE:

1. SHIJI,  
AGED 24 YEARS, D/O.SHAMSUDEEN, RESIDENT OF THAMAM,  
SREEYETTU, EDAVA, EDAVA VILLAGE, VARKALA UNIT-695311.
2. SAIBER,  
S/O.ANSARI, SAIBER VILLA, NEAR PRESS MUKKU, EDAVA P.O.,  
EDAVAL, EDAVA VILLAGE, VARKALA TALUK,  
THIRUVANANTHAPURAM-  
695311.
3. CIRCLE INSPECTOR OF POLICE  
VARKKALA, THIRUVANANTHAPURAM-695141.
4. STATE OF KERALA  
REPRESENTED BY THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM-6892031.

R1 BY ADV. SRI.LATHEESH SEBASTIAN  
R BY PUBLIC PROSECUTOR SRI.M.K.PUSHPALATHA

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 10-04-2018,  
THE COURT ON 18/6/2018 PASSED THE FOLLOWING:

CrI.MC.No. 6784 of 2017 ()

APPENDIX

PETITIONER(S) ' EXHIBITS

- ANNEXURE A1 TRUE COPY OF THE PETITION DATED 27-5-2017 BEFORE THE JUDICIAL MAGISTRATE OF FIRST CLASS, VARKKALA.
- ANNEXURE A2 TRUE COPY OF THE TITLE DEED NO.3890/10 SUB REGISTRAR OFFICE, VARKKALA DATED 29-7-2010.
- ANNEXURE A3 TRUE COPY OF THE LAND TAX RECEIPT DATED 05-08-2016 OF EDAVA VILLAGE OFFICE.
- ANNEXURE A4 TRUE COPY OF THE BUILDING TAX RECEIPT DATED 28-03-2016 OF EDAVA GRAMA PANCHAYATH.
- ANNEXURE A5 TRUE COPY OF THE PROOF AFFIDAVIT FILED BY THE 1ST RESPONDENT DATED 27-05-2017.
- ANNEXURE A6 TRUE COPY OF THE ORDER DATED 17-7-2017 OF JUDICIAL MAGISTRATE OF FIRST CLASS-I, VARKKALA IN CMP NO.7085 OF 2016 IN MC NO.65 OF 2017.

RESPONDENTS EXHIBITS: NIL

/TRUE COPY/ PS TO JUDGE.

Dated this the 18<sup>th</sup> day of June, 2018

**O R D E R**

The petitioners herein are the respondent Nos. 3 and 2 respectively in MC No.65/2017, pending before the Judicial First Class Magistrate, Varkala. The first respondent herein, who is the daughter-in-law of the petitioners, sought various reliefs under the Protection of Women from Domestic Violence Act, 2005 (herein after referred to as the DV Act, for brevity).

2. The second respondent herein, who is the son of the petitioners, had married the first respondent on 7/2/2016. A child was born in the matrimonial relationship. The relationship got strained in the course of time. The first respondent alleged that due to unbearable matrimonial harassment meted out by the husband and the in-laws, she was forced to leave the matrimonial home and was taken by her parents to their house. Alleging that, thereafter, the husband and the in-laws had not maintained her, the first respondent initiated proceeding before the Magistrate Court under the DV Act, seeking various reliefs, including a residence order, with respect to "Saiber villa", which she claimed to be the shared household. The court below granted an ex parte residence order in favour of the first respondent. It was enforced with police protection.

3. The first petitioner appeared before the Magistrate and filed objection for himself and others. One of the contentions set up therein was that, Saiber villa, regarding which residence order was sought, exclusively belonged to the first petitioner and that the second respondent herein did not have any legal right over the building. It was claimed that Saiber villa stood in the exclusive possession and ownership of the first petitioner, having obtained right, title and interest by registered document, which was produced along with the objection. It was hence contended that ex parte residence order could not have been granted by the court. It was stated that, on the strength of the ex parte order, the first respondent and her parents occupied that house with police aid, on 16/6/2017. The house had only three bed rooms and the first respondent and her parents occupied two bed rooms. Hence, the petitioners were forced to leave the house and they are now residing in another house. It was further contended that, in the light of the decision of the Supreme Court in ***S.R.Batra and another v. Taruna Batra (2007) 3 SCC 169***, the wife is only entitled to claim right of residence in a shared household, which meant, the house belonging to or taken on rent by husband or house which belonged to joint family, of which husband was a member. The learned Magistrate, on an evaluation of the available inputs, by Annexure A6 order held that the disputed house was not a shared household and that first respondent was not

entitled for the residence order, The relief sought in the MC, with respect to the house, was thus answered against the wife.

4. According to the petitioners herein, even after the passing of the order, the first respondent and her parents continue to reside in the house. The court below expressed its inability to enforce the the order vacating the ex parte residence order, purportedly in the absence of any specific enabling provision. Hence, Crl.M.C was filed seeking appropriate reliefs to give effect to Annexure A6 order. It was contended that, in the absence of any specific provision under the DV Act empowering the court to enforce an order against the wife who had initiated the DV proceedings, the only option was to seek an order under section 482 Cr.P.C. , to meet the ends of justice.

5. Heard the learned counsel for the petitioners and the learned counsel for the respondents.

6. Evidently, an order of residence was granted ex parte,in favour of the first respondent herein, which was vacated after hearing the opposite side. It is alleged that, the first respondent and her parents who got access to the house on the strength of ex parte order continue to reside in the house. That allegation is not seen controverted. Hence, the question that arises in this proceeding is whether an order vacating the ex parte order of residence granted by the court below can be enforced under the D.V.Act.

7. Evidently, the D.V.Act is a welfare legislation intended to

protect women who are subjected to domestic violence by her husband or relatives. It ensures several reliefs to the “aggrieved person” under the Act, in the form of protection order, residence order, monetary reliefs and compensation orders. It also provides a machinery for adjudication of disputes and enforcement of its orders. Section 19(5) enables the court to order enforcement of its orders under sub sections 19(1), (2) or (3) and to direct the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf, in the implementation of the order. Section 19(7) empowers the Magistrate to direct the officer in charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order. Section 23 empowers the Magistrate to pass any interim and ex parte orders in any proceeding under the Act, pending before him. It is clear that, under the Act, the Magistrate is conferred with very wide powers to grant relief to an aggrieved person and to enforce its own order, with the aid of the police. In the present case, admittedly ex parte order of residence was enforced with the aid of the police.

8. The crucial question that arises in this case is whether an order vacating ex parte residence order granted in favour of the aggrieved person, can also be enforced against the aggrieved person. The specific contention of the learned counsel for the first respondent

is that, there is no specific provision in the Act which empowers the Magistrate to grant any relief against the aggrieved person and for enforcement of such orders.

9. Definitely, the DV Act provides for a cheap, speedy and efficacious mode of granting reliefs to the aggrieved person and for its enforcement. No doubt, the Scheme of the statute clearly indicates that, it is a beneficial legislation with a definite lean in favour of the oppressed and weaker section of society, the aggrieved woman. This is justifiable since the Act is intended to provide effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any kind, occurring within the family.

10. However, it is incongruous and contrary to every legal principle to hold that the statute authorizes for enforcement of orders in favour of one party and not orders passed against that party. It also does not stand to reason to hold that the court is empowered only to implement its ex parte order, but is powerless to restore the parties to their original position, when that ex parte order is vacated, modified or set aside. Evidently, no party to the proceeding can continue to take advantage of an ex parte order which was later vacated on merits. That will be against the very basis of the Rule of Law. Generally, a statute cannot be expected to protect a person who gets the benefit of an order and continue to protect, even after

the order is reversed or modified, on a premise that law does not provide for restitution of parties. Such an interpretation will only make the entire legal system mockery. Evidently, when a person takes the benefit of an order passed by a competent court, which is later held to be not sustainable on merits, it cannot be held that law is powerless to restore the person against whom that ex parte order was enforced, to the position status quo ante. Definitely, if the court is authorised to enforce an ex parte order, it must be deemed to have all such implied powers, even in the absence of a specific statutory provision, to enforce its own order vacating the order. The court cannot be held to be helpless in such a situation, otherwise that may be a lop sided imparting of justice. This proposition seems to be in conformity with the view of His Lordship M.P.Menon J, who, in a different context, in **Cheru Osueph v. Kunjupathuma (1981 KLT 495)** observed that it is contrary to law to hold that a court which is authorised to dismiss a proceeding for default is incompetent to restore it.

11. Though, at first blush, the contention that there is no specific provision under the DV Act to implement an order against the aggrieved person may appear to be correct, a careful reading of the provisions of DV Act proves otherwise. Sections 18,19,20,21 and 22 refer to reliefs which can be granted in favour of the aggrieved person, and against the respondent. Each of the above provision

specifically provides that order can be passed in favour of the aggrieved person. Section 19 (5) clearly empowers the Magistrate to direct the officer in charge of the police station to give protection to the aggrieved person in implementation of its order. Section 19(7) empowers the Magistrate to direct the officer-in-charge of the police station in whose jurisdiction the Magistrate has been approached, to assist in the implementation of the protection order. However, the above sections specifically refer to aggrieved person alone, and is hence available only to the aggrieved person or to a person making application on her behalf, and not to the respondent in the proceeding.

12. However, Section 23(1) empowers the Magistrate to pass such interim orders as he deems fit and proper. Section 23 (2) empowers the Magistrate to grant ex parte orders in favour of the aggrieved person. Section 23 (1) does not make any distinction between the aggrieved person or the respondent in the proceeding. It empowers the Magistrate to “pass any interim order as he deems just and proper”. This confers wide powers on the Magistrate to pass any order, if the situation so demands, and if it is “just and proper”, in favour of any party, irrespective of whether it is sought by the aggrieved person or the respondent, This seems to be the only provision in the statute which does not prescribe the party in whose favour or against whom, the relief is to be granted. On the other

hand, section 23 (2) specifically provides that ex parte orders therein are to be granted against the respondent therein and hence necessarily in favour of the aggrieved person. The significance of section 23(1) is so clear from the statute. Though all the other provisions provided in the statute, except section 23(1) are specifically made applicable to the aggrieved person and against the respondent, section 23 (1) does not make any distinction between the aggrieved person or the respondent in the DV Act proceedings.

13. Evidently, sub sections 23(1) and 23(2) operate in two different situations. Further Section 28 provides that, except as provided in the Act, all proceedings mentioned therein, including one under section 23 shall be governed by the provisions of Code of Criminal Procedure. Consequently, section 23(1) can be invoked in appropriate cases, to pass orders even against the aggrieved person if the court deems it just and proper. Evidently, in a proceeding under the DV Act wherein a relief granted in favour of the aggrieved person is modified, vacated or varied, the Magistrate is competent to pass such orders to give effect to its own order. Clearly, in the present case, the Magistrate is competent to invoke section 23(1) and to direct the aggrieved person to vacate the premises and in case of breach, to direct the SHO to implement its order invoking section 23 (1) and section 28, to ensure that the parties are restored to the position which they held prior to the granting of the ex parte order. It

is not only open to the court to invoke the powers under section 23 (1), but it is the duty of the court to pass such orders in appropriate cases to meet the ends of justice. Hence, when ex parte residence order is vacated, Magistrate shall invariably direct the aggrieved person to vacate the disputed house within a specified time to be fixed by the Magistrate and in case of failure to comply with that direction, to pass such orders under section 23 (1) of the Act to implement it.

14. Hence, in the light of above discussion, Crl.M.C.is liable to be allowed holding that the magistrate passing the ex parte residence orders under section 19 of the Domestic Violence Act is equally competent under section 23 (1) of the Act to enforce its order vacating the ex parte order and necessary directions can be issued to the jurisdictional SHO to enforce its order.

In the peculiar facts of this case, the first respondent is granted ten days time from today to remove herself and her family members from the disputed house named "Saiber villa" and if its not complied within the above time limit, on application, the jurisdictional magistrate shall pass such orders to enforce Annexure A6 order.

Sd/-

**SUNIL THOMAS**  
**Judge**

dpk

/true copy/ PS to Judge.

